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ABBREVIATIONS OF COMMISSION REPORTS

- Ann. Proc. Nat. Asso. R. Annual Proceedings of the National Association of Railway Commissioners.
- Ann. Rep. Ala. R. C. Annual Report of the Alabama Railroad Commission.
- " " Ariz. C. C. Annual Report of the Arizona Corporation Commission.
- " " Ariz. R. C. Arizona Railway Commission Annual Reports. 1909-10.
- " " Ark. R. C. Arkansas Railroad Commission Annual Reports.
- " " Cal. Bd. R. Co. ... California Board of Railroad Commissioners. Annual Reports.
- " " Can. R. C. Board of Railway Commissioners of Canada Annual Reports.
- " " Colo. P. U. C. ... Annual Report of the Colorado Public Utilities Commission.
- " " Col. S. R. C. Colorado State Railroad Commission Annual Reports. 1907-14.
- " " Conn. P. U. C. ... Annual Report of the Connecticut Public Utilities Commission.
- " " Conn. R. C. Annual Report of the Connecticut Railroad Commissioners. 1853-1911.
- " " Dist. Col. P. U. C. Annual Report of the District of Columbia Public Utilities Commission.
- " " Fla. R. C. Annual Report of the Railroad Commission for the State of Florida.
- " " Ga. R. C. Annual Report of the Railroad Commission of Georgia.
- " " Houston, Tex., P. S. C. Houston, Texas, Public Service Commissioner, Annual Reports.
- " " Ia. R. C. Annual Report of the Iowa Board of Railroad Commissioners.
- " " Ida. P. U. C. Annual Report of the Idaho Public Utilities Commission.
- " " Ill. P. U. C. Annual Report of the Public Utilities Commission of Illinois.
- " " Ill. R. & W. C. ... Annual Report of the Illinois Railroad and Warehouse Commission. 1871-1913.
- " " Ind. P. S. C. Annual Report of the Indiana Public Service Commission.

ABBREVIATIONS.

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Ann. Rep. Ind. R. C.	Annual Report of the Railroad Commission of Indiana. 1906-1912.
" " Kan. R. C.	Annual Report of the Railroad Commissioners of Kansas.
" " Ky. R. C.	Annual Report of the Kentucky Railroad Commission.
" " La. R. C.	Annual Report of the Railroad Commission of Louisiana.
" " Los Angeles Bd. P. U.	Los Angeles, Cal., Board of Public Utilities Annual Reports. 1909-1913.
" " Manitoba P. U. C.	Manitoba Public Utilities Commission, Canada. Annual Reports.
" " Mass. G. & E. L. C.	Annual Report of the Massachusetts Board of Gas and Electric Light Commissioners.
" " Mass. High Com.	Annual Report of the Massachusetts Highway Commission. (Tel. Cos.)
" " Mass. P. S. C. ..	Annual Report of the Massachusetts Public Service Commission.
" " Mass. R. C.	Annual Report of the Massachusetts Board of Railroad Commissioners.
" " Md. P. S. C.	Annual Report of the Maryland Public Service Commission.
" " Me. P. U. C.	Annual Report of the Public Utilities Commission of Maine.
" " Me. R. C.	Annual Report of the Board of Railroad Commissioners of Maine.
" " Mich. R. C.	Annual Report of the Michigan Railroad Commission.
" " Minn. R. & W. C.	Annual Report of the Minnesota Railroad and Warehouse Commission.
" " Mo. R. & W. C. .	Annual Report of the Missouri Railroad and Warehouse Commission.
" " Mo. R. C.	Annual Report of the Missouri Board of Railroad Commissioners. 1875-1889.
" " Mont. R. & P. S. C.	Annual Report of the Railroad and Public Service Commission of Montana.
" " Mont. R. C.	Annual Report of the Railroad Commission of Montana. (See M. U. R.)
" " N. C. C. C.	Annual Report of the North Carolina Corporation Commission.
" " N. C. R. C.	Annual Report of the North Carolina Board of Railroad Commissioners. 1891-1898.
" " N. D. C. of R. ...	Annual Report of the North Dakota Commissioners of Railroads. 1890-1912.
" " N. D. R. C.	Annual Report of the Board of Railroad Commissioners of North Dakota.

- Ann. Rep. Neb. Bd. Trans. . . . Annual Report of the Nebraska Board of Transportation. 1887-1900.
- " " Neb. R. C. Annual Report of the Nebraska Board of Railroad Commissioners. Only 1st Annual Report. 1885.
- " " Neb. S. R. C. Annual Report of the Nebraska State Railway Commission.
- " " Nev. P. S. C. Annual Report of the Public Service Commission of Nevada.
- " " Nev. R. C. Annual Report of the Railroad Commission of Nevada.
- " " N. H. P. S. C. Annual Report of the New Hampshire Public Service Commission.
- " " N. H. R. C. Annual Report of the New Hampshire Board of Railroad Commissioners.
- " " N. J. P. U. C. Annual Reports of New Jersey Board of Public Utility Commissioners.
- " " N. J. R. C. New Jersey Board of Railroad Commissioners Annual Reports. 1907-1910.
- " " N. M. S. C. C. Annual Report of the State Corporation Commission of New Mexico.
- " " N. Y. P. S. C. (1st Dist.) Annual Report of New York Public Service Commission, First District.
- " " N. Y. P. S. C. (2d Dist.) Annual Report of New York Public Service Commission, Second District.
- " " N. Y. R. C. New York Railroad Commission Reports, — 1906.
- " " Nova Scotia P. U. C. Nova Scotia Board of Commissioners of Public Utilities, Canada, Annual Reports.
- " " Ohio C. of R. & T. Annual Report of the Ohio Commissioner of Railroads and Telegraphs. 1867-1905.
- " " Ohio P. S. C. Annual Report of the Public Service Commission of Ohio. 1912.
- " " Ohio P. U. C. Annual Report of the Public Utilities Commission of Ohio.
- " " Ohio R. C. Annual Report of the Railroad Commission of Ohio. 1906-1911.
- " " Okla. C. C. Annual Report of the Corporation Commission of Oklahoma.
- " " Ontario Ry. & Mun. Bd. Ontario Railway and Municipal Board, Ontario, Canada, Annual Reports.
- " " Or. R. C. Annual Report of the Oregon Railroad Commission.
- " " Pa. P. S. C. Annual Report of the Pennsylvania Public Service Commission.

ABBREVIATIONS.

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Ann. Rep. Pa. S. R. C.	Annual Report of the Pennsylvania State Railroad Commission.
" " Quebec P. U. C. ...	Quebec Public Utilities Commission, Canada, Annual Reports.
" " R. I. P. U. C. ...	Annual Report of the Public Utilities Commission of Rhode Island.
" " R. I. R. C.	Rhode Island Railroad Commission Annual Reports. 1889-1911.
" " S. D. R. C.	Annual Report of the South Dakota Railroad Commissioners.
" " Tex. R. C.	Annual Report of the Railroad Commission of Texas.
" " Va. S. C. C.	Annual Report of the State Corporation Commission of Virginia.
" " Vt. R. C.	Annual Report of the Railroad Commissioners of Vermont.
" " Wash. P. S. C. ..	Annual Report of the Public Service Commission of Washington.
" " Wash. R. C.	Annual Report of the Railroad Commission of Washington.
" " Wilmington, Del., P. U. C.	Wilmington, Del., Board of Public Utility Commissioners Annual Reports.
" " W. V. P. S. C. ..	Annual Report of the Public Service Commission of West Virginia.
A. T. & T. Co. Com. L.	American Telephone and Telegraph Company Commission Leaflet.
" " C. T. C.	American Telephone and Telegraph Company Commission Telephone Cases.
Bien. Rep. Cal. Bd. R. C. ...	California Board of Railroad Commissioners Biennial Reports.
" " Kan. P. U. C. ...	Biennial Report of the Kansas Public Utilities Commission.
" " Miss. R. C.	Biennial Report of the Mississippi Railroad Commission.
" " Vt. P. S. C.	Biennial Report of the Public Service Commission of Vermont.
Cal. R. C. R.	California Railroad Commission Reports.
Can. Ry. Cases	Canada Railway Cases (in 16 vols. to date).
Colo. P. U. C.	Decisions of the Public Utilities Commission of Colorado.
Fed. Tr. Rep.	Federal Trade Reporter.
Hawaii P. U. C.	Hawaii Public Utilities Commission.
Ill. P. U. C. R.	Illinois Public Utilities Commission Reports.
Ill. R. & W. C. D.	Decisions of the Railroad and Warehouse Commission of Illinois.
Inters. Com. Rep.	Interstate Commerce Commission Reports.
K. C. Mo. P. U. C.	Kansas City, Mo., Public Utilities Commission Reports. 1st Semi-Annual, 1909. 1st Annual, 1911.

Mo. P. S. C. R.	Missouri Public Service Commission Reports.
M. U. R.	Montana Utilities Reports.
N. B. Bd. P. U. C.	New Brunswick Board of Public Utilities Commissioners, Canada.
N. H. P. S. C. R.	N. H. Pub. Ser. Commission Reports.
N. J. P. U. C. R.	Reports of the Board of Public Utilities Commissioners of New Jersey.
N. Y. Off. Dept. R.	New York Official Department Reports.
Pa. P. S. C.	Pennsylvania Public Service Commission Reports.
P. C. R.	Pennsylvania Corporation Reporter.
P. I. P. U. C.	Philippine Island Public Utilities Commission.
P. S. C. R. (1st Dist. N. Y.) ..	Public Service Commission Reports, First District New York.
P. S. C. R. (2d Dist. N. Y.) ..	Public Service Commission Reports, Second District New York.
P. S. Reg.	Public Service Regulation.
Rate Res.	Rate Research, published by the National Electric Light Association.
R. I. Bd. R. C.	Rhode Island Board of Railroad Commissioners Reports.
St. J. Mo. P. U. C.	St. Joseph, Mo., Public Utilities Commission. (No regular reports.) 1909-1913.
St. L. Mo. P. S. C.	St. Louis, Mo., Public Service Commission.
Tenn. R. C.	Tennessee Railroad Commission (no decisions published). Annual Reports. 1897-1912.
Utilities Mag.	Utilities Magazine.
Wis. R. C. R.	Wisconsin Railroad Commission Reports.

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LIST OF APPEALS, REHEARINGS, AND MODIFICATIONS.

Illinois.

Re Greater Chicago Lake Water Co. P.U.R.1927C, p. 511.

Order and certificate of convenience and necessity modified so as to permit the construction and operation of additional facilities including a tunnel and filtration plant, and on supplemental application for authority to issue stocks authorization of stock issue granted (May 23, 1928).

Re Pekin Water Works Co. P.U.R.1928C, p. 266.

Schedule of rates set forth in original order amended in accordance with stipulation (April 12, 1928).

Re Vermilion County Teleph. Co. P.U.R.1928C, p. 160.

Rate schedule annulled and company permitted to file a revised schedule of rates containing a rate of 25 cents per month, in addition to the regular exchange rate for telephone hand sets (February 29, 1928).

Oregon.

Re Standards for Motor Carriers, P.U.R.1928B, p. 611.

Matter dismissed and closed upon the docket of the Commission (March 1, 1928).

Pennsylvania.

Ewing v. Pennsylvania Chautauqua, P.U.R.1928C, p. 377.

On petition for modification of Commission order, so as to postpone effective date of tariff, respondent required to file, post and publish a new tariff within thirty days from date of service of order (February 14, 1928).

Wisconsin.

Re Iron River Water, Light & Teleph. Co. P.U.R.1928C, p. 93.

Supplementary order entered to make more evident the intent of the original order (March 5, 1928).

PUBLIC UTILITIES REPORTS

MISSOURI PUBLIC SERVICE COMMISSION.

RE PICKWICK STAGES SYSTEM.

[Cases Nos. 5349, 5350.]

Interstate commerce — Motor carriers — Submission to state regulation.

1. The requirements of the Missouri Bus Law as to securing a certificate of convenience and necessity, paying special license fees for the use of the road, the observance of general rules and regulations promulgated by the Commission, and the furnishing of proper liability insurance are applicable even to interstate motor carrier operation and do not place an undue or unjust burden upon interstate commerce, p. 14.

Certificates of convenience and necessity — Interstate carriers — Intrastate business.

2. Full compliance with the law of a state requiring a certificate to do interstate business does not carry with it the right to haul intrastate passengers on the exclusive interstate busses, p. 16.

Monopoly and competition — Motor carriers — Adequacy of existing service.

3. A company operating interstate motor busses should not be authorized to do an intrastate business in competition with motor carriers and railroads successfully handling all traffic that is offered, and able to meet future traffic demands, when the entry of another motor carrier into the intrastate traffic would reduce the revenues of the existing carriers thereby checking their expansion and impairing their service, p. 17.

Rates — Jurisdiction of Commission — Motor carriers — Freight and express.

4. The Commission has no jurisdiction over freight and express rates of motor carriers, p. 17.

Commissions — Jurisdiction — Conflict with municipal powers — Motor carriers.

5. The Commission does not attempt to assume the powers that
P.U.R.1928B.

have been reserved by the state to the various municipalities with respect to the regulation of motor carriers, p. 18.

[December 22, 1927.]

APPLICATIONS for certificates of convenience and necessity permitting the operation of motor busses as common carriers of passengers, baggage, and express for hire; applications for authority to operate interstate service approved subject to compliance with Missouri Bus Law, and applications otherwise denied.

Porter, Commissioner: These cases are before the Commission upon the filing of applications by the Pickwick Stages System, a corporation, hereinafter called the applicant, for certificates of convenience and necessity to operate motor busses as a common carrier of passengers, baggage, and express, for hire over the public highways of the state of Missouri from and including Kansas City, Missouri, over state highway designated as State Route U. S. 71 through intermediate points to and including Joplin, Missouri, and also from and including the city of St. Louis, Missouri, over state highway designated as State Route U. S. 66 through intermediate points to and including Joplin, Missouri. Many protests were received and the cases were set for formal hearing on September 6, 1927 at the offices of the Commission at Jefferson City, Missouri. At this hearing the cases were consolidated and when not completed were continued to September 29, 1927, at the same location for further hearing. The cases were finally submitted after oral argument on October 21, 1927, and are now before us for a decision.

The appearances at these hearings were as follows: for the applicant O. J. Page of Springfield; for the protestants J. F. Green of St. Louis and Otto and Potter of Jefferson City for the Missouri Pacific Railroad Company; C. H. Skinker, Jr., of St. Louis and R. W. Hedrick of Jefferson City for the St. Louis-San Francisco Railway Company; L. M. Crouch, Jr., of Harrisonville for the Brown Brothers Bus Company, T. J. Roney of Webb City and A. L. McCawley of Carthage for R. A. McCartney and Coin Combs doing business as the Albatross Bus Line, Phil Donnelly of Lebanon and Leonard Walker of P.U.R.1928B.

Springfield for the Missouri Stage Lines, A. L. Sheppard of Watts and Gentry, St. Louis, for the American Railway Express Company, M. T. Fullington, General Chairman, for the Order of Railroad Telegraphers, Frisco Division 32, and D. D. McDonald and E. S. Austin for the Commission.

For the sake of brevity we will hereafter designate the route that applicant proposes to traverse from Joplin to Kansas City as the Kansas City route and for like reason the route from Joplin to St. Louis as the St. Louis route.

The petition alleges that the principal office of the applicant is 1725 East Seventh street, Los Angeles, California; that the motor vehicles to be used consist of the latest model of Standard and inter-city type of stages with a seating capacity ranging from 14 to 26 passengers, as the demands of the service require; that the applicant is the greatest combined manufacturer and operator of motor busses, as a common carrier for hire, in the United States; that it owns and operates motor bus transportation covering over 5,000 miles of routes in Oregon, California, Arizona, New Mexico, and Texas with joint passenger traffic arrangements to all points of interest and importance in said states and to all points of interest and importance in the state of Washington and to Vancouver, British Columbia; that applicant now proposed to extend this through service from Amarillo, Texas, its present eastern terminus, to Kansas City, Missouri via Oklahoma City, Tulsa, Joplin, and intermediate points over United States No. 71 Highway; and also from said eastern terminus to St. Louis, Missouri, via Oklahoma City, Tulsa, Joplin, Springfield, Rolla, and intermediate points over United States No. 66 Highway, known as the "Main Street of America"; that the rates charged will be a saving of \$18.75 on a one-way ticket between St. Louis and Los Angeles; and that the petitioner is incorporated under the laws of the state of California and is licensed to do business in the state of Missouri.

The applicant alleges that the following are the names of all persons, firms, or corporations now furnishing similar service on the Kansas City route: Kansas City Southern Railway Company, Missouri Pacific Railway Company, St. Louis & San Francisco Company, American Railway Express Company, P.U.R.1928B.

Brown Brothers Bus Company, and the Springfield-Joplin Bus Company. Applicant further alleges that the following are the corresponding names for the St. Louis route: St. Louis & San Francisco Railway Company, American Railway Express Company, Springfield-St. Louis Bus Company, Springfield-Joplin Bus Company, and the St. Louis-Manchester Bus Company.

The petitions further state that the applicant relies upon the following conditions to justify the issuance of said certificates;—the physical property of applicant, the financial rating of applicant as an added guarantee of safety and protection, the saving in time to the travelling public, the improvement over other lines in the sanitary conditions of applicant's property, the saving in money to its patrons, the opportunity offered to the travelling public of the far West to visit Missouri and vice versa, the extensive lines of the applicant, the growing demand for this mode of travel, the populous territory through which the route is laid guaranteeing sufficient patronage to insure the success of the enterprise, and the opportunity offered to the travelling public to better view the points of interest.

The petitions prayed for the issuance of certificates of convenience and necessity to operate as an interstate and intrastate common carrier of passengers, baggage, and express over the routes herein described. At the second hearing on September 29, 1927, the prayer was amended in regard to intrastate service to read as follows: "and to carry intrastate passengers, baggage, and express for hire on said interstate motor busses only—".

The applicant filed in the present cases the following exhibits:

Exhibit 1. Illustrated advertising folder of the applicant company.

Exhibit 2. Applicant's balance sheet at the close of business, December 31, 1926.

Exhibit 3. Recapitulations of applicant's revenues and expenses for the month of June, 1927.

Exhibit 4. Applicant's financial statement and annual report to stockholders for 1926.

Exhibit 5. Blue-print of the St. Louis route.

Exhibit 6. Blue-print of the Kansas City route.

P.U.R.1928B.

Exhibit 7. Certificates of mileages in Joplin, Carthage, Springfield, and St. Louis.

Exhibit 8. True copies of applicant's articles of incorporation and amendments thereto, certified to by the secretary of state, state of California.

Exhibit 9. Carbon copy of letter, unsigned, relative to various United States highways and their connections.

Exhibits 10 to 21 (inclusive). Photographs of types of equipment that applicant uses over its lines and of types of buildings owned or used as stations.

Exhibit 22. Copy of Springfield, Missouri, newspaper giving details of mass meeting of Frisco employees to protest operation of applicant's busses.

Exhibit 23. Copy of applicant's acceptance of terms and conditions of permit No. 4624 issued September 27, 1927, under which applicant received permission to operate a bus line over various streets in St. Louis, Missouri.

Exhibit 24. Certified copy of applicant's license to do business in the state of Missouri.

Exhibit 25. Applicant's permit to operate over the streets of Joplin, Missouri.

Exhibit 26. Applicant's permits to operate on the Kansas City route and on the St. Louis route over the streets of Carthage, Missouri.

Exhibit 27. Applicant's permit to operate over the streets of Springfield, Missouri.

Answers and briefs were filed in the application for the Kansas City route by the Missouri Pacific Railroad Company, the St. Louis-San Francisco Railway Company, the American Railway Express Company, the city of Joplin, the city of Carthage and the city of Kansas City. At the hearing counsel appeared in the interests of the Brown Brothers Bus Company and of the Albatross Bus Line (R. A. McCartney and Coin Combs).

Answers and briefs were filed in the application for the St. Louis route by the Missouri Pacific Railroad Company, the St. Louis-San Francisco Railway Company, the American Railway Express Company, the city of Joplin, the city of Carthage, the city of Springfield, the city of St. Louis, the Albatross Bus Line
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(R. A. McCartney and Coin Combs), the Missouri Stage Line, and the Order of Railroad Telegraphers.

Without going into details of the answers of the railroads in the two cases these allege, in general, the following: that the railroad companies have operated and now operate lines of railroad across the state of Missouri between Joplin and Kansas City and between Joplin and St. Louis; that said lines of railroad furnish adequate, sufficient, dependable, and satisfactory transportation facilities by rail between said cities and to all intermediate points; that the transportation service to be given by applicant will not be serving the public convenience and necessity; that said railroads have been largely instrumental in developing this section of the state of Missouri; that said railroads pay large taxes to the state of Missouri and have large payrolls which are distributed to many thousands of employees who reside in the state and spend the major portion of said payrolls within the state; that the passenger traffic of said railroads has suffered a material decrease within recent years; and that the competition of applicant will still further reduce said passenger traffic to the serious detriment of the revenues and therefrom the service of said railroads.

The answer of the American Railway Express Company states that the statute recently passed and relating to motor carriers, is the only statute of the state of Missouri relating to the operation of said motor carriers and that said statute confers no jurisdiction upon this Commission to issue to applicant a certificate of convenience and necessity to transport express or freight within said state of Missouri on said applicant's motor vehicles. Wherefore, said American Railway Express Company prays this Commission for an order dismissing, in so far as it may relate to the transportation of express or freight, the application of the applicant.

The city of Kansas City and the city of St. Louis made answers in all details similar to those heretofore made in previous cases before this Commission. Briefly these answers state that the Commission is without jurisdiction to grant any certificate of convenience and necessity for such part of the routes as lay within the corporate limits of said cities. Said answers state P.U.R.1928B.

that the applicant has not received the consent of a franchise or permit of either of said cities for the operation of said applicant within said cities. Said answers further state that the power to grant such franchise or permit was expressly reserved to said cities by the provisions of the Motor Bus Act and that said franchise or permit must be obtained from said cities in accordance with and under the provisions of ordinances of said cities and that such franchise or permit is a condition precedent to the operation of said applicant within the corporate limits of said cities.

The answers of the city of Joplin, the city of Carthage, and the city of Springfield waived any objection to the operation of the applicant over the streets and within the corporate limits of said cities. Said answers, however, did not waive any authority that said cities might have as municipalities.

The answers of the Albatross Bus Line and the Missouri Stage Line will be joined and stated briefly. These answers allege that the respective bus companies have been in continuous operation for a long time prior to the filing of the application in the present case; that said bus companies are now operating over the route which applicant proposes to traverse; that said bus companies have filed applications for certificates of convenience and necessity for their respective routes; that said bus companies are giving and will continue to give adequate, efficient, and satisfactory service over said routes; and that the granting of permission to applicant to parallel their operations will do them irreparable injury.

The answer of the Order of Railroad Telegraphers alleges, in general, the following: that it represents 1,375 employees of the Frisco working as agents, agent-telegraphers, telegraphers, etc., of whom 402 are residents of the state of Missouri; that bus and truck competition has already forced the closure of many railroad stations thereby forcing members of their organization out of regular employment; that a closed station is detrimental to the best interests of the communities involved; that the granting of the application in this case would tend to close still more railroad stations with its resultant evils; that bus and truck lines are jeopardizing the welfare of all railroad employees; that

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said railroad employees live along the lines of the railroad and pay state and county taxes and contribute to the general welfare of the various communities; that the continued operation of existing railroad service and the continuance in regular employment of the railroad's employees would be of more good and benefit to the general welfare of the various communities and the state than would that of the substituted bus service; and that the certificate herein should not be granted until such time as the laws of the state of Missouri provide fees for the operation of this traffic commensurate with the value thereof together with the cost of the upkeep of the highways under traffic such as is proposed.

The Facts.

The applicant in this case has operated for many years along the Pacific coast and mainly in the state of California. It was testified that it is the only motor carrier operating along the coast in the state of California, and that it has purchased all other motor carriers which formerly operated in this territory. The Pickwick Stages System is a subsidiary to the Pickwick Corporation, which is a manufacturing and holding company. The parent company manufactures the bodies and some of the chassis in their plant at Los Angeles, California. The motor and the rest of the chassis are bought from the Mack Company.

The parent Pickwick Corporation was incorporated under the laws of California. The Pickwick Stage Lines, the applicant in this case, was incorporated under the laws of Nevada. The applicant makes connections on the coast with other bus lines that go to points of interest, and also to bus lines with final destination at Vancouver, British Columbia. Commencing a few years back, it started extending its lines to the east, and at the time of the hearing the eastern terminus of the line was Amarillo, Texas. From there it is proposed to extend the system through Oklahoma City and Tulsa, Oklahoma, and a corner of Kansas, and though the state of Missouri to St. Louis, where it will make connections with lines which will ultimately carry it to the Atlantic seaboard.

In applying for a certificate of convenience and necessity to
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operate the Kansas City route and the St. Louis route, witness for applicant stated that the petition was not exactly clear as to their purposes. Said witness stated that they did not propose to put on any local cars, but that all intrastate passengers would be carried on interstate busses when seats for same were available. Upon cross examination, he stated that the company would conform to the requirements of the Missouri Law, and should it be necessary to do so, would place in operation extra equipment to take care of any overflow loads of intrastate travel. Witness stated that the surveys of this route have been made many years previously, and that it had been resurveyed as recently as the month of June, 1927, and that it was the opinion of the applicant company that there was sufficient travel to justify the operation of these busses. Witness also stated that it would be necessary, in order to make an adequate return, to have the permission to carry intrastate passengers. Witness did not think that the interstate operation alone would give sufficient revenue to justify the operation. This witness also stated that the application for the Kansas City route did not give the exact manner in which said route would be operated. Witness stated that they would probably run a shuttle bus from Carthage, Missouri, to Kansas City, Missouri, making connections at Carthage with their interstate busses.

This witness likewise testified that the applicant was a \$10,000,000 corporation, and that it had been in successful operation and paying about 8 per cent dividends for several years. Attention was called to the type of busses which they proposed to place on this route in Missouri. It was testified that there would be six of these busses with reclining chairs, lavatories, and ice water. It was further testified that when the traffic justified it they would place in operation their deck and a half motor cars, which carry a steward who serves hot drinks and sandwiches.

It was further testified that there would be no stops at the local points except on signal. It was also further testified that there would be no intrastate passenger business done on the Kansas City route between Kansas City, Missouri, and Nevada, Missouri.

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One witness for applicant testified that it was his opinion that the interstate operation could be carried on without the consent of the Commission.

The applicant had several witnesses who testified that they thought the granting of a certificate of convenience and necessity to the applicant would be a great convenience to the people along the routes that it proposes to operate. These witnesses, in some instances, testified to the adequacy and efficiency of the present bus companies operating over these routes but stated that they would like to have the additional line.

One witness for the applicant was the secretary of U. S. 66 Highway Association. He testified to the manner in which the applicant advertises the points of interest along its routes, and thought that it would be of great advantage to the state of Missouri to have the benefit of this advertising as it would bring many people into Southwest Missouri.

The testimony shows that the correct mileages of the Kansas City route are as follows: Kansas City 9.57 miles; Belton 0.30 miles; Peculiar 0.40 miles; Harrisonville 1.00 miles (detour); Butler 0.40 miles; Nevada 0.60 miles; Sheldon 0.40 miles; Carthage 0.70 miles; Joplin 4.50 miles; Jackson county 10.159 miles; Cass County 31.727 miles; Bates county 29.069 miles; Vernon county 30.810 miles; Barton county 20.043; and Jasper county 12.447 miles. The mileages for Kansas City, Carthage, Joplin, and the counties are certified. With the exception of Kansas City and Carthage the State Highway Department maintains the entire route. The mileages for the other cities are taken from speedometer readings and are included in the mileages given for the counties. The total mileage of said route from Kansas City to Carthage and inclusive of said cities is 145.425 miles.

The testimony further shows that the correct mileages for the St. Louis route are as follows: Joplin 4.50 miles; Webb City 2.30 miles; Cartersville 1.30 miles; Carthage 1.60 miles; Avilla 0.10 miles; Springfield 6.00 miles; Strafford 1.30 miles; Lebanon 0.50 miles; Waynesville 0.43 miles; Rolla 1.03 miles; St. James 0.90 miles; Cuba 0.40 miles; Bourbon 0.30 miles; Sullivan 1.10 miles; Stanton 0.70 miles; St. Louis 8.86 miles; P.U.R.1928B.

Jasper county 31.824 miles; Lawrence county 25.055 miles; Greene county 27.620 miles; Webster county 22.936 miles; Laclede county 34.186 miles; Pulaski county 29.632 miles; Phelps county 34.647 miles; Crawford county 23.751 miles; Franklin county 37.502 miles; and St. Louis county 24.400 miles. The mileages for Joplin, Carthage, Springfield, St. Louis and the counties are certified. With the exception of the four cities whose mileages are certified, the State Highway Department maintains the entire route. The mileages for the remaining towns are taken from speedometer readings and are included in the mileages for the counties. The total mileage of said route from the Missouri-Kansas state line to the St. Louis terminus and inclusive of the mileages in Joplin, Carthage, Springfield, and St. Louis is 312.513 miles.

The protestant railroads introduced witnesses who testified to the adequacy of their service and to the general manner in which motor travel and motor bus travel have reduced the number of passengers carried. Witnesses for the railroads likewise testified to the amount of taxes paid to the state by railroads and to the number of employees of the railroads living in Missouri, and to the size of the payrolls paid to said employees.

Witness for the Order of Railroad Telegraphers testified that many stations have been closed, and that this had caused many of the members of their order to be thrown out of employment. He further stated that further increase in motor traffic would mean further reduction in passenger service and the consequent closing of many more stations. He claimed that this would be injurious to the welfare of the communities affected, and likewise because more people in train service would be affected than those in bus service, it would eventually react against the state itself.

Witnesses for the protestant bus companies testified to the adequacy and sufficiency of the present service between Joplin and Springfield and between Springfield and St. Louis. It was testified that these operators had started with small equipment, but that as the roads grew better they had increased the size and quality of the equipment, and that they had every reason to believe that when traffic demanded it said operators would

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place upon the routes the latest in motor bus equipment. It was testified that these operators were particularly careful to see that all passengers were carried, and that in case of overflow passengers and no reserve equipment at the point where said passengers present themselves, said operators would hire private automobiles in order that none would be left behind. It was testified that the drivers of the motor busses now in operation were careful and courteous. It was testified that the service was regular and dependable, and that they maintain the schedules that have been published. These witnesses were of the opinion that should it become necessary to install additional equipment over these routes the present operators should have the first opportunity to supply such need.

Conclusions.

The Commission finds from the evidence in this case that there are certain facts which stand forth almost undisputed. Said facts are as follows: that the applicant company is financially and technically able to give the service applied for; that the equipment of applicant is slightly more luxurious than that of existing bus companies; that the railroads and the existing bus companies give ample service to satisfy the existing intrastate needs; and that the existing bus companies apparently have the full confidence of the communities which they serve and have shown a commendable spirit of enterprise in increasing and improving their service as rapidly as the road conditions and the demands of traffic warranted. The question for decision resolves itself into three parts. First, has this Commission authority under its statute and the general law of the land to demand as a prerequisite that it shall issue a certificate of convenience and necessity before the commencement of interstate operation of busses over the highways of the state of Missouri? Second, are interstate and intrastate so hopelessly commingled that authority for one could not be given without including authority for the other? Third, should a new company be allowed to traverse routes already adequately served because said company's equipment is slightly more luxurious?

This Commission derives its jurisdiction over motor carriers
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from the Missouri Bus Law which was passed by the 54th General Assembly of the state of Missouri. This act contains the following language:

Section 1. (b) "The term 'motor carriers' when used in this act means any person, firm, corporation, lessee, trustee, or receiver operating any motor vehicle with or without trailer or trailers attached, upon any public highway for the transportation of persons for hire between **fixed** termini over a regular route, whether within one city or otherwise even though there may be periodical or irregular departures from said termini or route."

Section 2. "The Public Service Commission is hereby vested with power and authority, and it shall be its duty to license, supervise, and regulate every motor carrier in this state, to fix or approve the rates, fares, charges, classifications, and rules and regulations pertaining thereto;—and to supervise and regulate motor carriers in all matters affecting the relationship between such common carriers and the travelling public. The Public Service Commission shall have power and authority by general order or otherwise to prescribe rules and regulations governing all such motor carriers. . . ."

Section 4. "It is hereby declared unlawful for any motor carrier to operate or furnish service within this state, *without first having obtained from the Commission a certificate declaring that public convenience and necessity will be promoted by such operation.* . . . In determining whether or not a certificate of convenience and necessity should be issued, the Commission shall give reasonable consideration to the transportation service being furnished by any railroad, street railway, or motor carrier. . . ."

Section 6. "In addition to the regular license fee imposed on all motor vehicles in this state, and its personal property tax, every motor carrier shall at the time of the issuance of a certificate of convenience and necessity, and annually thereafter on or between January 1st and January 15th of each calendar year, pay to the state treasurer of the state of Missouri the following annual license fee for the maintenance and repair of the public highways; . . . Provided, that where a motor carrier
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is operating a route in this and an adjoining state and the total mileage of said route in Missouri is ten miles or less, the license fees shall be one-third of the license fee as set out in this section.

. . . The Commission, upon the issuance of a license for any vehicle, as defined in this act, shall notify the state treasurer who shall receive the license fee for such vehicle and shall also notify the state treasurer of number of lineal miles of route used by the owner of that vehicle and the number of miles in which it operates on state roads, the number of miles it operates on county roads and the number of miles it operates on city roads not maintained by the State Highway Commission and the state treasurer shall distribute and credit to the State Highway Commission and to the proper county or city in the proportion that the number of lineal miles of route used by the taxed motor vehicle in each case bears to the total number of lineal miles of route over which such carrier operates and *the said funds so derived from said license shall be used for the maintenance and repairs of the highways and streets over which said carrier operates.*

. . . ”

Section 7. “No certificate of convenience and necessity shall be issued by the Public Service Commission to any motor carrier until and after such motor carrier shall have filed with, and the same has been approved by the Commission of this state, a liability insurance policy or bond . . . in such sum and upon such conditions as the Commission may deem necessary to adequately protect the interests of the public with due regard to the number of persons and amount of property involved, which liability insurance shall bind the obligors thereunder to make compensation for injuries to persons and loss of or damage to property resulting from the negligent operation of such motor carrier. . . .”

Section 13a. “It is hereby declared that the legislation herein contained is enacted for the sole purpose of promoting and conserving the interests and convenience of the travelling public. . . .” (Italics our own.)

[1] The applicant in the present case is a motor carrier within the meaning of the definition given above in § 1. As such, it is subject to the jurisdiction of this Commission in all matters

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affecting its relationship with the travelling public. It is subject to such rules and regulations as this Commission may prescribe for operations within the state of Missouri. It must secure from this Commission a certificate of convenience and necessity as a prerequisite to operation within the state. It must pay in addition to the regular license fee and property tax an annual license fee for the maintenance and repair of the public highways. It shall not receive a certificate of convenience and necessity until it furnishes satisfactory evidence, either by depositing a liability insurance policy with the Commission, or other means, of its ability to make compensation for injuries to persons and loss or damage to property resulting from the negligent operations of its motor vehicles.

In considering the interstate character of applicant's operations the question arises, do the above provisions go beyond the authority of the state as it is limited by the provisions of paragraph 8, article 1 of the Federal Constitution. The Commission is of the opinion that they do not.

"An interstate bus operation is different in many respects from interstate operations by rail transportation companies. The bus operation involves the use of public highways of the state and of the streets of incorporated cities and villages. Such use of highways and streets not only deteriorates the highways, thereby increasing the cost of maintenance, but involves the much more important consideration of the dangers incident to traffic congestion." (Cannon Ball Transp. Co. v. Public Utilities Commission, 113 Ohio St. 565, P.U.R.1926C, 564, 567, 149 N. E. 713.)

The United States Supreme Court has clearly outlined the regulatory powers of the state in *Clark v. Poor*, — U. S. —, 71 L. ed. —, P.U.R.1927D, 346, 348, 47 Sup. Ct. Rep. 702. The language is as follows:

"The plaintiffs claim that, as applied to them, the act involves the Commerce Clause of the Federal Constitution. They insist that, as they are engaged exclusively in interstate commerce, they are not subject to regulation by the state; that it is without power to require that before using its highways they apply for and obtain a certificate; and that it is also without power to P.U.R.1923B.

impose, in addition to the annual license fee demanded of all persons using automobiles on the highways, a tax upon them, under #614-94, for the maintenance and repair of the highways and for the administration and enforcement of the laws governing the use of the same. *The contrary is settled.* The highways are public property. Users of them, *although engaged exclusively in interstate commerce, are subject to regulation by the state to ensure safety and convenience and the conservation of the highways.* *Morris v. Duby*, No. 372, decided April 18, 1927, — U. S. —, 71 L. ed. —, 47 Sup. Ct. Rep. 548. Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use. *Hendrick v. Maryland*, 235 U. S. 610, 59 L. ed. 385, 35 Sup. Ct. Rep. 140; *Kane v. New Jersey*, 242 U. S. 160, 61 L. ed. 272, 37 Sup. Ct. Rep. 30; *Hess v. Pawloski*, No. 263, decided May 16, 1927, — U. S. —, 71 L. ed. —, 47 Sup. Ct. Rep. 632. Compare *Packard v. Banton*, 264 U. S. 140, 144, 68 L. ed. 596, 44 Sup. Ct. Rep. 257." (Italics our own.)

The opinion that the requirements of the Missouri Bus Law as to securing a certificate of convenience and necessity, as to paying special license fees for the use of the road, as to the observance of general rules and regulations promulgated by this Commission and as to the furnishing of proper liability insurance to care for injuries and property damage to other users of the highways are applicable even to interstate motor carrier operation and will not place an undue or unjust burden upon interstate commerce.

[2] The applicant in its brief filed in these cases stated that full compliance with the law to obtain a certificate to do interstate business, should carry with it the right to haul intrastate passengers on the exclusive interstate busses. The Commission cannot agree with this contention. Applicant cites the decision of the United States Supreme Court in *Interstate Busses Corp. v. Holyoke Street R. Co.* (273 U. S. —, 71 L. ed. 319, P.U.R. 1927B, 46, 47 Sup. Ct. Rep. 298). The language of the Court in this decision is applicable to these cases and is as follows: P.U.R.1928B.

"It is not shown that the two classes of business are so commingled that the separation of one from the other is not reasonably practicable or that appellant's interstate passengers may not be carried efficiently and economically in busses used exclusively for that purpose or that appellant's interstate business is dependent in any degree upon the local business in question. Appellant may not evade the act by the mere linking of its intrastate transportation to its interstate or by the unnecessary transportation of both classes by means of the same instrumentalities and employees." That this is sound doctrine cannot be denied for to hold otherwise would render futile all efforts of the state to regulate intrastate motor carrier operation when same was connected with interstate commerce and further would make it extremely difficult for the state to control its highways in the interests of the public welfare and safety.

[3] Applicant's applications, with the exception of that portion of the Kansas City route which lies between Carthage and Nevada, cover routes already being served by intrastate motor carriers. The uncontradicted testimony in these cases shows that said motor carriers have been operating for a long period and have increased and improved their service as rapidly as the conditions of the road and the demands of traffic warranted. Said testimony further shows that at times of unusual traffic demands, said motor carriers have made extraordinary efforts and have been successful in handling all passenger traffic that was offered. The whole history of said intrastate motor carriers is such as to give this Commission assurance of their good faith and a right to expect that all reasonable future demands of traffic in their territories will be cared for. In view of all the facts presented in these cases, the Commission believes that the entry of another motor carrier into this intrastate traffic would reduce the revenues of the existing motor carriers thereby checking their expansion and impairing their service. The Commission is, therefore, of the opinion that the best interests of the traveling public will be served by the denial of the application in so far as it applies to intrastate passenger traffic.

[4] The protests of the American Railway Express Company are well founded. This Commission has no jurisdiction

over the transportation of freight and express by motor carrier and it will therefore deny the request for approval of the freight and express rates filed in these cases.

[5] The answers of the city of Kansas City and the city of St. Louis are similar to those that have been discussed in previous cases. The applicant filed an alleged copy of its acceptance of a permit from the Board of Public Service to traverse certain streets in the city of St. Louis. The Commission will not discuss this conflict between the testimony of the applicant and the statements of counsel for St. Louis in the intervening petition and the brief filed in these proceedings. In previous cases the question raised by said cities has been discussed at length. In these cases the Commission will briefly reiterate the statements previously made, that is, that it has not in any previous case, nor will it in this or any future case attempt to assume the powers that have been reserved by the state to the various municipalities.

After full consideration of all pertinent facts the Commission is of the opinion that the application in so far as it applies to intrastate transportation of passengers should be denied. The Commission is of the further opinion that the exclusively interstate operation of applicant's busses will not be unduly hazardous nor cause undue congestion on the state highways. The Commission, therefore, upon the filing with it of proper liability insurance policies to protect other travellers and property along the state highways in case of injury from negligent operation of applicant's busses and upon the payment of the fees provided for in the Missouri Bus Law, will issue its certificate of convenience and necessity for the interstate operation of applicant's busses over the highways of the state of Missouri.

An order in keeping with the above will issue.

Ing and Calfee, Commissioners, concur; Brown, Chairman, concurs in results; Hutchison, Commissioner, absent.

Note.—Jurisdiction of State or Interstate Commerce.

I. Jurisdiction of the state.

In *Morris v. Doby*, No. 372, U. S. Adv. Ops. Oct. Term, 1926, p. 647, April 18, 1927, it was held that a highway commission might P.U.R.1928B.

limit the maximum load of a motor truck operated upon a Federal aid highway. Mr. Chief Justice Taft said: "An examination of the acts of Congress discloses no provision, express or implied, by which there is withheld from the state its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them. In the absence of national legislation especially covering the subject of interstate commerce, the state may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use applicable alike to vehicles moving in interstate commerce and those of its own citizens. *Hendrick v. Maryland*, 235 U. S. 610, 622, 59 L. ed. 385, 390, 35 Sup. Ct. Rep. 140; *Kane v. New Jersey*, 242 U. S. 160, 167, 61 L. ed. 222, 226, 37 Sup. Ct. Rep. 30. . . . The mere fact that a truck company may not make a profit unless it can use a truck with load weighing 22,000 or more pounds does not show that a regulation forbidding it is either discriminatory or unreasonable. That it prevents competition with freight traffic on parallel steam railroads may possibly be a circumstance to be considered in determining the reasonableness of such a limitation, though that is doubtful, but it is necessarily outweighed when it appears by decision of competent authority that such weight is injurious to the highway for the use of the general public and unduly increases the cost of maintenance and repair. In the absence of any averments of specific facts to show fraud or abuse of discretion, we must accept the judgment of the highway commission upon this question which is committed to their decision as against merely general averments denying their official finding."

A provision of the New York Public Service Commission Law relating to the electrification of railroads in certain cities, and giving the Commission the power to prescribe equipment, conflicts with Federal statutes authorizing the Interstate Commerce Commission to prescribe the design, construction, and material of locomotive, and to supervise the rolling stock of interstate railroads and is, therefore, invalid. *Staten Island Rapid Transit R. Co. v. Public Service Commission*, 16 F. (2d) 313, Sept. 9, 1926.
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WEST VIRGINIA PUBLIC SERVICE COMMISSION.

RE CUMBERLAND & ALLEGHENY GAS COMPANY.

[Case No. 1698.]

Valuation — Deduction for retirements — Amortization — Book investment.

1. Amounts which would properly be deducted from the book investment of a natural gas company for retirement were not deducted where the investment in the property should be amortized, p. 38.

Valuation — Reproduction cost — Check by index figures — Accuracy.

2. An estimate of the reproduction cost of utility property determined by checking the books by the application of index figures has little, if any, evidentiary value in determining the rate base where the books are not properly kept, and only 75 per cent of the property is checked with the accuracy required for its use in applying index figures, p. 41.

Valuation — Ascertainment of reproduction cost — Expert testimony.

3. The accepted rules of evidence cannot be entirely disregarded by presenting an estimate of reproduction cost based on expert opinion testimony unsupported by available testimony of persons personally acquainted with the property inventoried; but the correctness of the inventory may be assumed for the purpose of analyzing the property included in the reproduction cost exhibit and determining the reproduction cost thereof, p. 41.

Valuation — Opinion evidence — Weight — Rights of way.

4. Opinion evidence of one who is familiar with the territory as to the value of rights of way should outweigh that of an appraiser who is not familiar with the territory and testifies from information, p. 44.

Valuation — Overheads — Cost of foreman — Laying pipe.

5. The foreman cost per foot for the construction of 10-inch pipe should be less than for the construction of 12-inch pipe, p. 45.

Valuation — Cost of meter installation.

6. The cost of installing natural gas meters was fixed at 37½ cents in determining reproduction cost where there was one estimate at 25 cents and another estimate of 50 cents, p. 48.

Valuation — Gas leaseholds — Application of Boyle's Law.

7. Boyle's Law cannot reasonably be applied to determine the volume or recoverable gas in property leased by a natural gas company when the gas producing sands in which the company's wells are drilled are honeycombed with producing wells owned by other companies and independent operators and the wells differ in size, p. 49.

Valuation — Natural gas leaseholds — Investment cost.

8. The total amount invested by a natural gas company in leaseholds during the entire life of the property was allowed as the value of such leaseholds for rate making, where large amounts for rents and P.U.R.1928B.

royalties had been charged to operating expenses, as well as the cost of drilling dry holes, especially where it appeared that part of the leases had been surrendered, p. 51.

Valuation — Overheads — Engineering.

9. An allowance of 5 per cent was made for engineering in the valuation of natural gas property, p. 56.

Valuation — Overheads — Interest during construction.

10. An allowance of 6 per cent was made for interest during construction in the valuation of natural gas property, p. 56.

Valuation — Overheads — Corporate costs.

11. An allowance of 2 per cent was made for corporate costs in the valuation of natural gas property, p. 56.

Valuation — Overheads — Legal expense.

12. An allowance of 1 per cent for legal expense in the valuation of natural gas property, p. 56.

Valuation — Overheads — Basis — General equipment.

13. No overhead costs were added to general equipment of a natural gas company for the reason that the expense incurred for interest during construction, engineering, and legal expense would be negligible, and in view of the further fact that 14 per cent for overheads had been applied to land and other items, p. 56.

Depreciation — Accrued — Ascertainment — Natural gas main.

14. The making of only eight examinations of 12-inch natural gas mains, and four examinations of 10-inch mains, where there are approximately ninety miles of the line, with a failure to examine a 12-inch line about fifty-five miles long, cannot be approved as a method of determining accrued depreciation where the line extends through sections underlaid with coal and the soil conditions are constantly changing, p. 57.

Depreciation — Natural gas plant structures.

15. Structures of a natural gas company were depreciated approximately 2 per cent per year, p. 60.

Depreciation — Natural gas — Field rights-of-way — Field line construction — Field line equipment.

16. A lower percentage of depreciation may be applied to field rights-of-way, field line construction, and field line equipment of a natural gas company than is applied to wells, since a part of the field lines and rights-of-way may be used to gather gas after the company's wells are exhausted, p. 61.

Depreciation — Natural gas — Field measuring station equipment.

17. Field measuring station equipment of a natural gas utility was depreciated at approximately 2 per cent per year, p. 61.

Depreciation — Natural gas — Transmission rights-of-way — Land.

18. Transmission rights-of-way and land of a natural gas utility were not depreciated in a valuation proceeding, p. 61.

Depreciation — Compressor station — Natural gas.

19. Compressor station structures of a natural gas company having P.U.R.1928B.

an average age in excess of fourteen years, and compressor station equipment were depreciated about 2 per cent per year, p. 61.

Depreciation — Transmission line equipment — Natural gas.

20. Transmission line equipment of a natural gas company was depreciated approximately 1 per cent a year where there was a certain amount of deterioration in the iron and steel pipe not disclosed by a superficial examination, p. 62.

Depreciation — Office equipment — Compensating appreciation.

21. No deduction was made for depreciation of office equipment of a natural gas company where the appreciation in the old furniture would equal its physical depreciation, p. 63.

Valuation — Accrued depreciation — Redundancy or excess capacity.

22. A deduction should be made in the valuation of natural gas property for redundancy or excess capacity which is shown to exist by reason of a large reduction in the quantity of gas transported through mains and pipes, p. 64.

Apportionment — Natural gas company — Interstate system — Line loss.

23. The apportionment applied to the transmission system of a natural gas company having property in two states should be applied to the line loss, p. 65.

Valuation — Property not used — Parallel gas mains.

24. A parallel transmission line no longer useful for the purpose for which it was originally constructed should be deducted in the valuation of natural gas property, when the remaining transmission line has a capacity in excess of that required to transport the gas being sold by the company, p. 68.

Accrued depreciation — Natural gas system — Exhaustion of gas.

25. Depreciation in natural gas property resulting from the decreased life of the plant by reason of the exhaustion of the natural gas itself was considered in a valuation for rate making, p. 69.

Valuation — Market value — Natural gas system.

26. The Commission in valuing natural gas property which has recently been purchased is entitled to know the amount for which the property was sold, p. 72.

Valuation — Going value — Necessity of allowance.

27. An allowance for going value should be added in valuing natural gas property for rate making, p. 74.

Valuation — Working capital — Necessity of allowance.

28. An allowance for working capital should be added in valuing natural gas property for rate making, p. 74.

Return — Operating expenses — Uncollectible accounts.

29. A reserve for uncollectible accounts of a natural gas company should not be charged to operating expense when each consumer is required to make a deposit before receiving gas, p. 75.

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Return — Operating expenses — Donation.

30. Donation should not be charged as an operating expense of a natural gas company, p. 76.

Return — Operating expenses — Management fees.

31. A management fee and percentage of gross revenues payable to another company were disallowed as an operating expense of a natural gas company where general office salaries had been increased as well as the salaries of other employees as the management fee had been disallowed by the Commission in former cases involving the property, p. 77.

Return — Operating expenses — Cost of rate cases.

32. An excessive charge of the cost of a rate case should not be allowed as an operating expense especially when it may be that certain of the expense was incurred for reasons other than presenting the case to the Commission, p. 77.

Return — Powers of Commission — Management — Extravagant expenditures.

33. The Commission although not the manager of public utilities has the power to scrutinize carefully extravagant expenditures in a rate case, p. 77.

Return — Gross revenues — Natural gas company — Gasoline revenues.

34. Income from the sale of gasoline by a natural gas company should be included in the gross revenue for the purpose of fixing rates when the company has expended large amounts for rerubbing its line which rerubbing was made necessary because of the fact that the gasoline was extracted from the gas, particularly where it appears that before the line was rerubbed millions of feet of gas were lost by reason of the shrinkage of the rubber gaskets; that the gas is still escaping by reason of the fact that the gasoline has been extracted from the gas; and that the removal of the gasoline reduces the heat units in the gas, p. 78.

Depreciation — Basis — Book cost.

35. It is the book cost or original investment that must be amortized through the annual allowance for depreciation and depletion, and not the value of the property, p. 80.

Return — Natural gas company — Percentage allowance.

36. A natural gas company is entitled to rates that will enable it to undertake to earn a return of 8 per cent, p. 86.

Rates — Natural gas — Step-up rate.

37. A schedule of "step-up" rates prescribed in order to conserve the gas supply and discourage the larger use of the fuel is not satisfactory where it is not possible for the company to conserve the gas underlying the property controlled by it, and its failure to purchase more gas will not prolong the life of the territory from which its purchased gas is produced, but in order to provide a greater volume of business for its future success a "step-down" rate should be made, p. 87.

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On Rehearing.

Reparation — Powers of Commission — Overcharges — Natural gas rates.

38. The Commission has no authority to require a natural gas company to remit to its consumers the difference between rates fixed by a Commission order and the rates in effect, p. 134.

Depreciation — Natural gas — Depletion and amortization.

Discussion of annual depreciation, depletion, and amortization in the case of a natural gas utility, p. 79.

Valuation — Going concern value — Cost of establishing business.

Statement that the cost of establishing the business is not the going value of a natural gas plant, p. 95.

Valuation — Natural gas holdings.

Discussion of the value of gas holdings of a natural gas company with a consideration of volume of gas in the ground, value of gas at the surface and cost of bringing the gas to the surface, p. 95.

Valuation — Overheads.

Discussion of engineering, field supervision, contractors' profits, and overheads of a natural gas company, p. 117.

(DIVINE, Commissioner, dissents.)

[October 26, 1927.]

INVESTIGATION of natural gas rate; temporary rates prescribed by former order discontinued and new rate schedules established.

ON REHEARING reparation order denied, petition for rearguments denied, and rate schedule modified to provide additional revenue.

Appearances: James Piper, Baltimore, H. D. Rummel, Charleston, and W. G. Stathers, Clarksburg, for respondent; E. F. Morgan, Charleston, for cities of Kingwood, Tunnelton, and Terra Alta; Young and McWhorter, Buckhannon, for city of Buckhannon; H. G. Kump, Elkins, for cities of Elkins, Beverly, Mill Creek, and Huttonsville; D. D. Stemple, Philippi, for city of Philippi; Charles D. Smith, Parsons, for city of Parsons; Bruce Talbot, Philippi, for city of Belington; Carleton C. Pierce, Kingwood, for city of Kingwood; Emory Tyler, Keyser, for city of Keyser.

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Nethken, Commissioner: On June 15, 1926, the Cumberland & Allegheny Gas Company, hereinafter called the Company, filed a tariff with the Commission stating certain changes in its rules and regulations, and in its rates, for furnishing natural gas to its consumers in forty-three cities, towns and villages in the state of West Virginia, the said tariff being designated P. S. C. W. Va. No. 3, and to become effective July 31, 1926.

The Commission, on its own motion, pursuant to § 9 of the Public Service Commission Law, entered an order on the same day providing for an investigation and hearing on the proposed rates, suspended the same until the 28th day of November, 1926, and set the matter down for hearing at the offices of the Commission in the temporary capitol building, in the city of Charleston, on the 20th day of July, 1926.

Protests have been entered by representatives of various municipalities, hereinafter called the Protestants, affected by the proposed increase in rates.

A comparison of the proposed rates with the rates in effect at the institution of this proceeding, is as follows:
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RATES IN EFFECT.

Towns.	Summer rate, per M cu. ft.	Winter rates, per M. cu. ft.			Proposed rate, per M cu. ft.
		First 10M cu. ft.	Next 10M cu. ft.	Over 20 M cu. ft.	
Jane Lew	\$.39	\$.39	\$.43	\$.47	\$.65
Butcherville .....	.39	.39	.43	.47	.65
Deanville .....	.39	.39	.43	.47	.65
Lightburn .....	.39	.39	.43	.47	.65
Buckhannon .....	.45	.45	.49	.53	.71
Hodgesville .....	.45	.45	.49	.53	.71
Berlin .....	.45	.45	.49	.53	.71
Philippi .....	.49	.49	.53	.57	.75
Volga .....	.49	.49	.53	.57	.75
Hall .....	.49	.49	.53	.57	.75
Belington .....	.49	.49	.53	.57	.75
Junior .....	.49	.49	.53	.57	.75
Dartmoor .....	.49	.49	.53	.57	.75
Elkins .....	.51	.51	.55	.59	.77
Beverly .....	.51	.51	.55	.59	.77
Mill Creek .....	.51	.51	.55	.59	.77
Huttonsville .....	.51	.51	.55	.59	.77
Parsons .....	.51	.51	.55	.59	.77
Hambleton .....	.51	.51	.55	.59	.77
Hendricks .....	.51	.51	.55	.59	.77
Montrose .....	.51	.51	.55	.59	.77
Moore .....	.51	.51	.55	.59	.77
Thomas .....	.53	.53	.57	.61	.79
Davis .....	.53	.53	.57	.61	.79
William .....	.53	.53	.57	.61	.79
Bayard .....	.53	.53	.57	.61	.79
Dobbin .....	.53	.53	.57	.61	.79
Gormanina .....	.53	.53	.57	.61	.79
Henry .....	.53	.53	.57	.61	.79
Kingwood .....	.56	.56	.60	.64	.82
Rowlesburg .....	.56	.56	.60	.64	.82
Manheim .....	.56	.56	.60	.64	.82
Tunnelton .....	.56	.56	.60	.64	.82
Albright .....	.56	.56	.60	.64	.82
St. George .....	.56	.56	.60	.64	.82
Black Fork Dist. ....	.56	.56	.60	.64	.82
Elk Garden .....	.56	.56	.60	.64	.82
Terra Alta .....	.57	.57	.61	.65	.83
Corinth .....	.57	.57	.61	.65	.83
Keyser .....	.57	.57	.61	.65	.83
Ridgeley .....	.62	.62	.66	.70	.88

All rates subject to a discount of 2 cents per M cu. ft. for prompt payment.

Notice having been given by the Company, as required by said order of June 15, 1926, the taking of evidence was begun on the 20th day of July, 1926. A number of hearings were had before the Commission, the last on January 8, 1927. The taking of testimony not having been completed on November 28, 1926, the date to which said tariff was previously suspended, the Commission found it necessary to further suspend said tariff P.U.R.1928B.

until the 27th day of May, 1927, and entered its order accordingly on the 27th day of November, 1926.

On January 5, 1927, the Company filed its petition asking permission to put into effect, as an emergency rate, a temporary increase of 20 cents per thousand cubic feet, for all gas furnished by it in this state, which petition was based on the value of the property as found by this Commission in Case No. 1461 (P.U.R.1924E, 24), the report of E. V. Williamson, statistician for the Commission, showing the income and operating expense of the Company, for the year 1926; and other statements and reports filed as a part of the record herein.

The Commission, after considering said petition, was of the opinion that the net income received by the Company during the year 1926 did not justify the granting of a temporary increase, particularly in view of the fact that this case was soon to be submitted to the Commission for its final decision, which accounts for the fact that no action was taken by the Commission on said petition.

On May 27, 1927, the Commission entered its order canceling the rates filed by the Company, but, being of the opinion that the rates then in effect were not sufficient to pay its reasonable operating charges, including taxes, and provide a fair return upon the fair value of its property within the state, and the Commission not being advised fully in the premises, authorized the Company to increase its rates in each town as follows; 15 cents per thousand feet of gas delivered each month over the summer rate, and 7 cents per thousand over the maximum winter rates, said increase to remain in effect pending final judgment of the Commission in this case.

History of the Operation

The record discloses that the business of the Company had its beginning in October, 1899, when the Buckhannon Gas Company, a West Virginia corporation, was organized, and acquired from the Eastern Oil Company about six thousand acres of leases and one gas well in Lewis county, West Virginia. A pipe line was constructed from its gas fields to Buckhannon and gas delivered to the town in February, 1900. This company continued
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business with one additional gas well until 1903, when its entire holdings were taken over by the West Virginia Central Gas Company.

In 1903, the West Virginia Central Gas Company constructed a 6 $\frac{3}{4}$ -inch transmission line from Berlin east to Belington, Philippi and Elkins. In the following year, this line was extended to Parsons.

In 1906, the West Virginia & Maryland Gas Company of West Virginia was organized and it constructed a 12-inch transmission line from Parsons, east to Cumberland, Maryland. In order to supply this line with gas it was necessary to parallel the 6 $\frac{3}{4}$ -inch line, constructed by the West Virginia Central Gas Company, with a 10-inch line from Parsons, east to the gas field. This line was completed and gas delivered to the city of Cumberland in 1907.

In 1909, the Northern Natural Gas Company was organized and it constructed a lateral transmission line from the main transmission line at a point near Gorman, in Grant county, West Virginia, northward about twenty miles to Oakland, Mt. Lake Park, and other towns in Maryland, and to Terra Alta in West Virginia. This line consisted of 5 and 6-inch pipe.

In 1911, all of the property of the West Virginia & Maryland Gas Company of West Virginia, situate in the state of Maryland, was taken over by the West Virginia & Maryland Gas Company of Maryland. In the same year, the West Virginia Central Gas Company replaced the 6 $\frac{3}{4}$ -inch line from Berlin to Belington with a 12-inch line, and used the pipe reclaimed therefrom for a lateral line from Parsons to Rowlesburg and Manheim. It was found necessary in this same year, on account of declining rock pressure in the gas field, to install a large compressor station on its main transmission line at Forman.

In 1914, the West Virginia Central Gas Company installed a compressor station known as Thomas Station, and, in 1916, it installed a compressor station known as Horner Station. In 1920, it began the development of its natural gas field in Braxton county. For the transmission line to Braxton county, the company used about twelve miles of 10-inch pipe taken from its parallel line between Weston and Parsons, indicating that

this pipe line was no longer used and useful at the place from which it was removed. The gas from this field is handled, in part, through a 16-inch transmission line belonging to the Pittsburgh & West Virginia Gas Company, under a contract between the companies. In this same year the West Virginia Central Gas Company installed a compressor station known as Ross Station.

In the period of its existence, the West Virginia Central Gas Company drilled 263 wells. The Company (the present owner) drilled one well, making a total of 264 wells, of which 47 were dry holes and 72 became exhausted prior to December 31, 1926, leaving 145 wells still in operation at that date.

The stock of the West Virginia Central Gas Company and practically all of the stock of the affiliated companies was owned by the Eastern Oil Company, and when hearings were had before this Commission (known as Cases Nos. 557, 929, 1158, and 1461), involving rates, all of the companies were consolidated and considered jointly.

The foregoing history discloses that the property of the Company lies principally in West Virginia, but also extends into Maryland. Practically all of the property is used jointly by the consumers of both states, with the exception of the distribution plants. The gas lands, the wells, the equipment therein, the gathering lines in the field and the pipe lines leading therefrom to the compressor station, the compressor stations, approximately ninety miles of the main transmission line and a part of the lateral transmission lines are located in this state.

The record further discloses that in the year 1926, 1,270,110 M cubic feet of gas were used by the West Virginia consumers and 1,021,246 M cubic feet by the Maryland consumers.

From what has just been said regarding the location of the property and the consumption of gas, it follows that an allocation of the property must be made, and the value determined for the property apportioned to the consumers in this state, as the property apportioned to Maryland should not be considered in arriving at the rate base for West Virginia. This allocation will hereinafter appear.

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Former Rate Cases

It may serve no useful purpose here to detail the findings of the Commission in former rate cases involving the rates of the Company and its predecessor companies. However, it is believed that some reference should be made, as the same property is involved.

Case No. 557, Re West Virginia Central Gas Co. 5 Ann. Rep. W. Va. P. S. C. 230, 1 P. S. C. W. Va. Decisions, 455, P.U.R.1918C, 453. Application was filed by the predecessors of the applicant on February 28, 1917. The case was decided January 22, 1918. The opinion of the Commission was delivered by Morgan, chairman. Samuel S. Wyer, consulting engineer and valuation expert, of Columbus, Ohio, witness for the applicant, filed with his evidence a complete inventory of the applicant's property, showing the reproduction cost of each item therein. Mr. Wyer used what he claimed to be a fair average price for material and labor during the 10-year period prior to September 1, 1915, and found the reproduction cost of the applicant's property, under his method, to be \$4,744,805.29, exclusive of overhead charges, going value, or working capital. There was included in the sum of \$4,744,805.29, \$541,050, for leaseholds and the labor cost of drilling certain wells amounting to \$418,000, which was not included in the applicant's book investment. These two items total \$959,050. Deducting this amount from the \$4,744,805.29, we get \$3,785,755.29, the reproduction cost. To this amount, he adds 20 per cent for overhead charges. Edwin M. Wheeler, secretary of the Eastern Oil Company, and its subsidiary companies, testified that the total investment in the entire plant, as disclosed by the books of the companies, was \$3,576,689.85, which did not include the \$418,000 representing the labor cost of drilling wells. H. E. Nease, statistician for the Commission, found the book investment to be \$3,533,627.80, which did not include the labor cost of drilling wells. Comparison of these amounts with the reproduction cost of the property, as found by witness Wyer, discloses that his figures, exclusive of overhead charges, are approximately \$209,000 higher than the actual cost of the property, exclusive of the amount P.U.R.1928B.

expended for leaseholds and labor cost of drilling wells. Howard B. Thomas, vice-president of the applicant companies, testifying for the applicant, fixed the value of the property at \$4,000,000. It appears that the Commission did not accept the overhead charges as applied by witness Wyer, but did accept his reproduction cost of leaseholds, amounting to \$541,050 and his rate of depreciation, which was 28 per cent, and was applied to the property as a whole. The rate base in this case was fixed at \$3,497,893.36, and a substantial increase in rates was granted.

Case No. 929. Re West Virginia Central Gas Co. 7-8 Ann. Rep. W. Va. P. S. C. 188, 199, 1 P. S. C. W. Va. Decisions, 686. Application was filed by the same companies, for further increases in rates, on August 23, 1919. The case was decided March 31, 1920. Wiles, chairman, delivered the opinion of the Commission. The valuation arrived at in Case No. 557, *supra*, was not questioned except as to the value of leaseholds, which was disallowed, for reasons stated in the opinion. However, it did allow \$56,000 as an operating expense to cover cost of drilling wells, and appears to have accepted the 28 per cent depreciation found reasonable in Case No. 557, *supra*, and, considering the time that had elapsed, found the depreciated value of the property to be approximately \$3,000,000. The prudence of the applicant's investment was questioned by the Commission in this case, in language as follows:

"Protestants not only complain of the inferior character of the service now being rendered, but question as well the wisdom and prudence of applicant's investment in the large main leading from its gas field to Cumberland, Maryland. Undoubtedly the applicant has sufficient gas to amply supply all its consumers when this line was projected and laid, and the wisdom and prudence of this extension can only be properly judged in the light of the then existing facts. The applicant was operating in a very rich and highly competitive field. Its supply of gas exceeded the demand of its consumers within the territory then served by its pipe lines. On account of its fugitive volatile nature, natural gas is his who first reduces it to possession. It cannot be stored except in the bowels of the earth. It was a race

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between the applicant and its competitors as to which could most quickly possess the apparently abundant supply in this rich field. This object could only be profitably accomplished by finding a market to absorb the supply. To meet this condition the applicant, at great expense, made this extension. The field was more rapidly exhausted than was then anticipated and the investment has not proved to be profitable. In the light of the present, it would seem that prudence would have required the applicant to secure a larger reserve acreage to meet the future demands of the market thus created; other than this the result of this venture may be credited to the inherent hazards of the business."

Substantial increases were granted in this case, and the life of the property estimated to be from seven to ten years.

Case No. 1158. Re West Virginia Central Gas Co. 7-8 Ann. Rep. W. Va. P. S. C. 501, 506, 508, 1 P. S. C. W. Va. Decisions, 862. Application was filed by the same companies, for further increases in rates, on October 25, 1920. The case was decided June 28, 1921. Wiles, chairman, delivered the opinion of the Commission. The increase applied for was granted, in part. The valuation fixed by the Commission in Case No. 929, *supra*, was not disturbed or in any way changed in this case. At the time this case was being heard, the West Virginia Central Gas Company, one of the applicants, was operating its Braxton county field, and, by reason of the then expected life of said field, the applicant was authorized to charge to operating expenses one-third of its investment in its Braxton county field, or \$80,000, for the year 1921, stating, however, "If it hereafter develops that the life of this field is shorter or longer than we have estimated, then a further adjustment of this item will be necessary." Chairman Wiles, discussing return and depreciation, said, in part:

"In this case it seems plain that applicant's investment is greater than its total gas sales would warrant under ordinary circumstances. Applicant has a plant of ample capacity to handle more than five times the volume of gas sold in 1920. . . . The logical solution of applicant's difficulty is an increase in volume of business or decrease in plant investment.

"We are of the opinion to allow for return upon investment P.U.R.1928B.

and depreciation reserve 12 per cent of \$3,000,000, or \$360,000, which, added to our estimate of operating expense and taxes for 1921, shows applicant should have total gross revenue of \$910,000."

Case No. 1461. Re West Virginia Central Gas Co. 11 Ann. Rep. W. Va. P. S. C. 139, P.U.R.1924E, 24, 33, 35, 38, 39, 41, 42. Application for further increases in rates was made by the same companies on August 14, 1923, the case decided June 2, 1924, and the applicants granted a flat increase of 7 cents per thousand cubic feet on all existing rates in this state, which was less than one-third of the amount applied for. The opinion of the Commission was delivered by Divine, chairman, and, after referring to the decision of the United States Supreme Court in the case of the Bluefield Water Works & Improv. Co. v. Public Service Commission, 262 U. S. 679, 67 L. ed. 1176, P.U.R. 1923D, 11, 43 Sup. Ct. Rep. 675, had the following to say:

"To understand fully the relation existing between a gas utility and its customer, and the difference between a gas utility and other public utilities we must consider what is allowed to a gas utility as operating expenses, in addition to the usual charges made by other utilities.

"When a gas utility obtains a lease upon land for gas purposes, the rental charge therefor is charged to operating expenses and when a tract of land under lease is drilled and commences to supply gas the royalty which it is necessary to pay is charged to operating expenses. When a gas well is drilled and field lines constructed the cost of freight, teaming, and labor is charged to operating expenses, which amounts to approximately three-fourths of the cost in the drilling of wells. . . .

"The applicants contend that the value of their property should be based upon the present day cost as applied to the Wyer inventory, and that valuing the property on this basis, it would be worth approximately \$9,000,000 before depreciation, and applying the depreciation of 50 per cent the property would be worth approximately \$4,500,000, and that by no possible means could the property be valued at less than \$3,500,000. Mr. Wheeler, a witness for the applicants, testified at length in regard to the present cost of labor and the present cost of material entering P.U.R.1928B.

into the applicants' plant. He also testified that the additions to the plant since January 1, 1917, to June 30, 1923, were \$227,112.18; however, there was no evidence as to retirement during that period, but the same witness did testify that the plant was practically the same as when inventoried and appraised by Mr. Wyer, in connection with Case No. 557, P.U.R.1918C, 453, 461, which was decided by this Commission on January 22, 1918. It should be noted in this connection that the inventory and appraisal of Mr. Wyer did not include what is known as the Braxton field, and the Braxton field is not in this case considered as part of the property which should be taken into consideration in the valuing of the applicants' plant, as the entire cost of this Braxton field has been and is being charged to operating expense. . . .

"After giving consideration to the evidence relating to reproduction value, so far as applicable, the amount invested in the plant prudently made, the depreciated investment and other elements of value usually considered and those peculiar to this case, the Commission is of the opinion that the fair value of the applicants' property for ratemaking purposes is \$3,000,000. This amount includes the amount allowed for going concern value and working capital, which if fixed separately would, under rules formerly adopted by the Commission, result in an allowance of \$300,000 for going concern value and \$70,000 for working capital. . . .

"After giving consideration to the earnings and the amount that has accrued for depreciation, the probable life of the plant, and the scrap value thereof, we believe an allowance of 5 per cent upon the value of \$3,000,000, fixed for rate purposes in this case is a fair allowance for depreciation and depletion, or retirement of investment. . . .

"The applicants have set upon their books for the year ending July 30, 1923, a charge of \$135,590.31, in connection with the Braxton county development. This amount, which seems to be considerably in excess of anything charged for this purpose, in the past seems to have been brought about by the drilling of a large number of wells in the first part of the year 1923, but from the evidence we do not believe this large amount can be used as a P.U.R.1928B.

forecast for the future, and that an allowance for this purpose of \$85,000 would be ample. . . .

"Recasting Mr. Nease's statement of income and expenses for the year ending June 30, 1923, in line with our conclusions expressed above, we obtain the following results:

<i>Operating Expenses and Taxes.</i>	
"Salaries—general office	\$10,846.00
Legal—general	4,786.26
Rent, supplies, etc.—General office	4,614.47
Taxes	46,334.99
Miscellaneous	7,601.14
Operating Expenses—Ordinary	365,084.75
Braxton County Development	85,000.00
Total	\$524,268.61"

Commissioner Stathers did not agree with the Commission's finding in Case No. 1461, *supra*, and, in his dissenting opinion regarding the value of the applicant's property, said:

"It is my judgment that the property of the applicants is not the same value for rate-making purposes today that it was in 1917, 1920, and 1921, notwithstanding the effort made by the applicants to increase the Wyer valuation of 1917, determined upon the reproduction cost theory, by showing the increased cost in labor and material since that time. While the reproduction method must be given weight in arriving at the valuation of the property of a utility for rate-making purposes, yet, this method of arriving at value cannot be given the same weight in fixing the rate base of a natural gas company, and particularly, a company in the applicants' position with respect to gas supply.

"The Commission will give such weight to the reproduction new value less depreciation as it considers it entitled to, being guided at all times by the principle that the company is entitled to a fair return upon the fair value of its property devoted to public service.' *Natural Gas Co. v. Public Service Commission*, 95 W. Va. 557, P.U.R.1924D, 346, 121 S. E. 716, 724.

"Admittedly, the gas fields of the applicants have been greatly depleted and will be exhausted in a few years. Therefore, the applicants are purchasing gas now and must purchase more gas in the future. With this depletion and exhaustion, the development of an uncertain field, the lack of reserve acreage, and the purchasing of gas, the value of their plant has decreased. The P.U.R.1928B.

same value cannot attach to their plant now, when they are compelled to purchase gas, as attached to it when they had gas of their own. Especially is this true because the applicants not only have an insufficient source of supply of their own but have been unable to secure a reasonably long time purchase contract from any company or individual producing gas. The applicants state frankly that they cannot get a contract for more than a year's duration at the present time and that they may not be able to secure a contract for even that short period hereafter. The writer is quite certain that a gas utility without any gas of its own or one with but little gas of its own and without any assurance of gas from the production of others for a reasonably long period of years, does not have the same value for rate-making purposes as the plant with an adequate gas supply. We cannot disassociate the physical property of a gas company from its gas supply, produced or purchased. The value of the physical plant cannot be fixed separate and apart from a consideration of the use to which that physical plant is to be put.

"It is quite clear from an examination of this record, which, by agreement of counsel, includes the records in the three proceedings mentioned, that the applicants in the beginning of their engagement in the gas business failed to provide sufficient gas territory to serve the plant constructed by them. They built a plant much too large for the gas acreage originally acquired and thereafter did not make a sufficient outlay of capital, or use the sums earned for depletion or depreciation from time to time, to purchase additional gas producing territory and, thereby, through replacements keep their acreage up to an amount sufficient to serve the plant which had been constructed. These are proper matters for consideration by this Commission in arriving at a fair value of applicants' plant." (At pp. 44-46 of P.U.R. 1924E.)

The protestants, in Case No. 1461, *supra*, decided June 2, 1924, appealed from the decision of the Commission to our Supreme Court of Appeals. *Elkins v. Public Service Commission*, 102 W. Va. 450, P.U.R.1927B, 270, 135 S. E. 397. The court, in passing on the case October 26, 1926, said:

"The chief issue presented involves the value of the applicant P.U.R.1928B.

cants' property used and useful in the public service. In determining rates, the Commission fixed the rate base, or value of the physical property plus going value and working capital, at \$3,000,000. Because of a large accrued depreciation reserve, amounting to \$2,039,407.35, and the fact that only a small fractional part of the capacity of applicants' plant is being used in serving the public, the protesting consumers contend that the valuation is excessive to an amount equal to the depreciation reserve which they say should be deducted from the gross investment or book value of \$3,791,258.20, in ascertaining a fair value of the physical property. The utilities, on the other hand, assert that by valuing the property under the reproduction cost theory a greater valuation should have been allowed. . . .

"Taking into consideration the excessive capacity of the plant for the service rendered, and rejecting the theory that the depreciation reserve should be deducted from the value of the physical property, the finding in our opinion was well within the discretion of the Commission. The valuations, established by three previous investigations, follow:

January 22, 1918	\$3,497,893.36
March 25, 1920	3,000,000.00
May 25, 1921	3,000,000.00

"The opinion of the Commission, determining the valuation of May 25, 1921, stated that the investment was greater than the total gas rates would warrant under ordinary circumstances, that the plant was of ample capacity to handle more than five times the volume of the gas sold in 1920, and that the logical solution of the difficulty was to increase the volume of business or decrease the plant investment. . . .

"Counsel for the applicants concede 'that, if a utility is disabled from functioning (as a gas company without sufficient source of supply), there would be an increased depreciation in physical elements,' but insist that a new rule in rate making should be applied in this case, fixing the rate according to what the utility regards as the value of the service, rather than at such amounts as will produce a fair return upon the value of the property used and useful in rendering it. We unhesitatingly answer the proposition as already stated, in accordance with P.U.R.1928B.

Charleston v. Public Service Commission (95 W. Va. 91, P.U.R. 1924B, 601, 120 S. E. 398), cited that a public service company furnishing natural gas to the public is entitled to a fair rate upon the present fair value of its property used and useful in the public service, to be ascertained as of the time the service is rendered. This rule is subject only to the condition that a utility will never be permitted to charge more than the value of the service which it is rendering.

"We do not find sufficient cause in the action of the Commission determining the rate of depreciation reserve, or of any other factor necessary for establishing a proper rate, justifying setting aside or modification of the order complained of." (At pp. 271-274 of P.U.R.1927B).

Book Costs

John Jirgal, witness for the Company, representing the firm of Arthur Anderson & Company, certified public accountants, after an examination of the Company's books, finds the original investment, or book cost, of the applicant's property, as of December 31, 1925, to be \$4,714,928.18.

E. V. Williamson, statistician for the Commission, at the request of the protestants, made an examination of the Company's books and found the original investment, or book cost, as of December 31, 1925, to be \$4,714,159.06, and as of December 31, 1926, \$4,758,211.44.

[1] It should be noted, however, that no retirements are shown on the books of the Company's predecessors up to and including the year 1924. Certain retirements are reflected in the book adjustments made by Mr. Jirgal and Mr. Williamson. However, it appears that all horses, wagons, automobiles, tools, office furniture, and other articles purchased by them during their entire existence still remain on the books, as retirements of this kind of property are not shown by the books, the adjustment, nor in any other way.

Mr. Jirgal, referring to adjustments, by reason of the retirement of wells, states that in many instances casings were withdrawn from wells when the gas was exhausted. He does not say whether the casing withdrawn is the first or second installed. P.U.R.1928B.

Mr. Neals testified that the average life of casing in a well is twelve years, which is the only evidence we have concerning this matter. It is reasonable to assume that the age of the abandoned wells is over twelve years, in which case it would be the second casing, which would indicate that the cost of the first casing is included in the capital account. This would be true also of the wells in service over twelve years of age, and pipe lines laid to abandoned wells, unless the pipe had been taken up, in which case the cost of laying the line is included in the book cost as found by Mr. Jirgal. In other words, it is believed that where two strings of casing have been installed in the same well, the cost of both is included in the book costs.

In view of the fact that the equipment that was once being used to furnish gas to industrial consumers is not now being used, it is reasonable to assume that much of this equipment has been retired from service, but still remains on the books and goes to make up the book investment, as found by Mr. Jirgal and Mr. Williamson.

Mr. Williamson, in his report, filed as a part of the record herein, states that it is not possible to determine from the books just what property has been retired, as it was not sufficiently designated.

It would, therefore, appear that a considerable sum should be deducted from the book investment to cover the items mentioned, but since the investment in the property should be amortized, no deduction will be made at this time.

The predecessor companies, beginning with the year 1910, charged the drilling cost of wells to operating expense. This practice was approved over the objection of the protestants in Cases Nos. 557, 929, 1158, and 1461, *supra*. However, the practice does not appear to be in accord with the Classification of Accounts, as prescribed by the Commission, therefore, Mr. Jirgal and Mr. Williamson, following the Classification of Accounts, as prescribed by the Commission, restored to capital account the drilling cost of wells and also the labor cost of laying the Braxton line, which had been charged to operating expense.

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Reproduction Cost

The Company attempted to show the reproduction cost of its property by submitting Jirgal Exhibit No. 3, purporting to show the reproduction cost by applying index figures to the original cost of the property, as found by Mr. Jirgal. It, therefore, becomes necessary to scrutinize carefully the items included in the original cost, or book investment. In this connection, it may be pointed out that, in addition to the items mentioned, there is included in the book investment the labor cost of 124 wells, and the labor cost of laying the Braxton line, which was provided for and paid out of operating expense; the total cost of all parallel lines and the cost of cutting through pavements when the lines were laid in the city of Cumberland, Maryland.

It is a matter of common knowledge that, at the time the plant was constructed, which was twenty years ago, little or no paving had been done in any of the towns in West Virginia in which the distribution systems are installed, and that the city of Cumberland, Maryland, had a population, at that time of 25,000 and many of its streets were paved, which, of course, would add considerably to the cost of laying the distribution lines in that city. Besides, Mr. Jirgal finds that the average reproduction cost of the Company's wells to be \$11,000 per well.

It is manifest, from what has just been said, that it would be difficult, if not impossible, to determine, with any degree of accuracy, the property included in the investment, as shown by the books, particularly as applied to West Virginia, as Mr. Jirgal makes no attempt to apportion the cost of the property between the states.

The report of Mr. Williamson discloses that the Company drilled and equipped 117 wells during the period from 1916 to 1925, inclusive, at an average cost of \$6,670 per well, or approximately 40 per cent less than the reproduction cost estimated by Mr. Jirgal; and the record discloses that the protestants introduced exhibits to show that the cost of steel pipe in the year 1925 was approximately 15 per cent higher than in 1906, which may be compared with the amounts used in Mr. Jirgal's exhibit showing 70 per cent increase for the same period.

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The record further discloses that all material, when received, was added to the capital account, therefore, all of the material that was ever received by the Company is included in the capital account, as the property retired, when making repairs, is not reflected by the books, or in any way deducted.

[2] It is agreed that, where the books of a utility are properly kept, the application of index figures is not only a proper, but a desirable, check in determining the reproduction cost of the property; but, as in this case, where the books are not properly kept, and considering the fact that Mr. Jirgal checked only 75 per cent of the property with the accuracy required for its use in applying index figures, it would appear that the reproduction cost, as found by him, has little, if any, evidentiary value in determining the rate base.

[3] The Company also had an inventory and appraisal of its physical property made by the engineering firm of Sanderson and Porter, which is contained in two separate printed volumes, designated Part 1 and Part 2, "Reproduction Cost of Physical Property," and filed as Smith Exhibits Nos. 1 and 2, to the filing of which, or any evidence in support thereof, protestants objected.

The inventory of the entire property was taken by other employees of the firm of Sanderson and Porter (not under the direct supervision of Mr. Smith), after obtaining certain information from the employees of the Company, using what is known as the "spot check" system.

It may be noted here that the employees of Sanderson and Porter who actually made the inventory were not called to testify, nor were any of the employees of the Company upon whose information the inventory was based called to testify in this case.

The record discloses that no change has been made in the division superintendents since the property was taken over by the Company. The writer has personal knowledge of the fact that many, if not all, of the division superintendents were employed by the predecessors of the Company, as such, for years, and these division superintendents should have known, and probably did know, if the maps and records were properly kept, just what property, in his division, was in place and was used and

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useful and its condition at the time this case was presented. It appears reasonable to conclude that Mr. Smith, from the cursory examination made by him of the property covering a period of ten days, much of which time was consumed in traveling, would not be in a position to testify that all of the property included in the inventory and appraised by him is now in place and being used by the Company to serve its present consumers. It is believed that the persons who actually made the inventory or at least the person who was present and had actual charge of the taking of the inventory, should have testified, for the purpose of connecting up the testimony of Mr. Smith, and that protestants should have been given the opportunity to examine said persons in order to determine just how the inventory was taken.

The ability of Mr. Smith to appraise the property by estimating the reproduction cost thereof is not questioned, and it is believed that his estimated reproduction cost is the result of his best judgment. However, since the inventory is not based upon personal knowledge gained from his own observation or examination, but based upon information gained from others, or hearsay, it is believed that the persons giving the information should have testified to the truthfulness thereof. Mr. Smith's testimony is competent in so far as his estimates go, but standing alone is not sufficient to establish the existence of all the items included in the inventory.

It is true that neither the law nor the rules of the Commission require that the strict rules of evidence be observed in presenting a case to the Commission. However, this must not be construed to mean that the accepted rules of evidence may be entirely disregarded by presenting the case on unsupported expert opinion testimony, particularly when absolute proof of the issue involved is obtainable.

From what has been said, we are of the opinion that the testimony of Mr. Smith, unsupported, regarding the inventory, should not be accepted as competent evidence or conclusive proof of the fact that all of the property shown by the inventory and contained in Smith Exhibits Nos. 1 and 2 is being used by the Company at this time to furnish gas to its consumers. However, since the record herein does show that the Company, by the use

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of its property, is furnishing gas to its 24,000 consumers located in certain towns in this state and in Maryland, the correctness of the inventory will be assumed, for the present, for the purpose of analyzing the property contained in Smith Exhibits Nos. 1 and 2, and determining the reproduction cost thereof.

The protestants did not have a complete inventory and appraisal made of the Company's property. A. Spates Brady, witness for the protestants, did estimate the reproduction cost of the first eight items on page 113 of Smith Exhibit No. 2, and found the total reproduction cost of said items to be \$1,463,915. Mr. Smith's estimated reproduction cost of the same items totaled \$1,837,716, or 25 per cent higher than Mr. Brady's. Mr. Brady also testified, at length, regarding the detail development of typical unit costs, as used by Mr. Smith and shown in Smith Exhibit No. 3, contending that the unit costs as used by Mr. Smith were too high. It is difficult to reconcile the great difference in the two estimates, particularly in view of the fact that each of them appear to be well qualified to estimate the reproduction cost of the physical property. Mr. Brady also contends that the high pressure valves used in the construction of the lines of the Company are not necessary by reason of the pressure being carried at this time and pointed out the difference in the price of the high pressure and low pressure valves. Mr. Brady further contends that the plant as now constructed is capable of handling many times the quantity of gas that is now being sold by the Company, and that the excess plant should be taken into consideration in arriving at the value of the property at this time; and, in support of his contention regarding this matter, introduced figures to show that a transmission line could be constructed and compressor stations installed for less than \$900,000, which may be compared with the figures above, which did not include the cost of compressor stations.

The protestants also introduced a number of witnesses to show that labor was plentiful in the territory in which the Company's property is located, and that the prevailing price for labor was 30 to 35 cents per hour. The record discloses that Mr. Smith used 50 and 55 cents per hour.

We have prepared a rather detailed statement in which we P.U.R.1928B.

have adjusted the estimated reproduction cost of the separate items included in the production system, transmission system, distribution system, and general equipment, as shown in Smith Exhibit No. 18, column 1, which does not include the amount added by him for engineering and overhead. This statement also shows the percentage of overhead allowed, the rate and amount of depreciation deducted and the allocation of the property between the states. This table is designated Table No. 1 and is attached hereto and made a part hereof. The various items are hereinafter referred to in the order mentioned, which is slightly different from the order in which they appear on Smith's Exhibit No. 18.

Production System

Item 1, Well Construction, and Item 2, Well Equipment, total \$1,086,975, and represent the estimated reproduction cost of the Company's 148 wells, or \$7,344 per well, exclusive of engineering and overhead. The report of Mr. Williamson discloses that the average cost of wells drilled during the years 1916 to 1925, inclusive, during which time the present prices prevailed, was \$6,670, and that the average cost of drilling thirty-nine wells, in the years 1923 and 1924, was \$6,437 per well, including engineering and overhead, or approximately 10 per cent less than the reproduction cost estimated by Mr. Smith, exclusive of engineering and overhead.

Mr. Williamson's report further discloses that the average depth of wells drilled during the years 1916 to 1925, inclusive, is 2,384 feet, and that the average depth of all wells drilled prior to 1916 was 2,245 feet.

It would appear, from what has just been said, that a reduction from Mr. Smith's estimate of at least 10 per cent would be reasonable for these two items.

Item 3, Drilling Equipment, and Item 4, Other Investments, have not been changed.

[4] Item 5, Field Rights-of-way. The cost of this item and Item 11, Transmission Rights-of-way, shown by the report of E. V. Williamson, is \$96,099.44. Mr. Brady expressed the opinion that the real estate in the territory in which the lines are laid had P.U.R.1923B.

not increased in value, and that the cost of obtaining the rights-of-way would not exceed one dollar per rod, or \$23,886. The opinion of Mr. Brady, who is familiar with the territory, should outweigh that of Mr. Smith, who is not familiar with the territory and testified from information. We are of the opinion that \$35,000 would be a reasonable amount to allow for Field Rights-of-Way, Item 5.

Item 6, Field Measuring Structures. This item has been reduced 5 per cent by reason of the fact that the estimate of Mr. Smith for labor, freight, and purchasing and hauling materials is believed to be too high.

[5] Item 7, Field Line Construction, and Item 8, Field Line Equipment. We are of the opinion, after making a careful examination of Smith Exhibit No. 3, detailing the development of unit costs and used by Mr. Smith in his estimate of the reproduction cost of the physical property, that the percentages, or amounts, used by Mr. Smith are too high; besides, we find it difficult to reconcile some of Mr. Smith's estimates. For example: The amount set up for foreman, for the construction of 10-inch, plain-end pipe, is \$.0218 per foot. The same item for the construction of 12-inch plain-end pipe is \$.0173 per foot. It is obvious that the foreman cost per foot for the construction of 10-inch pipe would be less than for the construction of 12-inch pipe. This item for 10-inch pipe should be \$.0130 per foot.

Mr. Smith's Exhibit No. 3 also shows that the length of ditch excavated per man per day is 22.5 feet, and it is estimated that each foreman would have charge of twenty men, therefore, twenty men would excavate 450 feet per day. Multiplying 450 by \$.0173, we get \$7.78, the actual charge for the foreman under this estimate, as compared with \$6 shown in said exhibit.

Counsel for the Company point out that Mr. Smith's laborer performs 54 per cent more work in a day than Mr. Brady's. In this they appear to be in error, as Mr. Brady estimates that one man will excavate 21.6 lineal feet, as compared with Mr. Smith's estimate of 22.5 feet, or approximately 4 per cent more, instead of 54 per cent as contended by counsel.

A careful examination of Smith's Exhibit No. 6, Inspection of Pipe in the Ground, discloses that the trenches in which pipe P.U.R.1928B.

5 inches and under is laid have an actual depth of 40 per cent less than that used by Mr. Smith in estimating the reproduction cost of the trenches and back filling.

The record discloses that Mr. Smith, in making his estimate for the reproduction cost of the physical property, assumes that it will be necessary to board all laborers in camp; that it will cost \$1.33 per day to board each man; and that the amount actually charged for board is \$1; resulting in a loss to the Company of 33 cents per day for each man employed, and \$1 per day for each man not working.

Mr. Gribble, witness for the Company, testified that certain gas lines had recently been constructed by the Hope Natural Gas Company; that from 300 to 800 men were used in the construction of the lines; and that 85 per cent of the labor was local and picked up along the lines. It would follow, therefore, that it is not at all likely that it would be necessary to board over 50 per cent of the men in camps or that any considerable sum would be expended in securing labor.

Mr. Smith, when estimating the cost of pipe, used the general market price for a ton of pipe and did not take into consideration that a lower price per ton might be obtained on a quantity such as would be necessary in the reproduction of the Company's property. Neither does he take into consideration cash discounts that may be allowed, nor savings from competitive bidding.

After carefully considering the unit cost development in Mr. Smith's Exhibit No. 3, and the evidence introduced by the protestants concerning this matter, we are of the opinion that his estimated cost for labor is at least 20 per cent too high, and that his other estimates are all too high, particularly securing labor; camp equipment; tools; purchasing and inspection of pipe; freight; unloading; checking, piling and loading on wagons; and waste, breakage and damage to pipe.

Mr. Gribble testified that the Hope Natural Gas Company paid its labor 45 cents per hour, but admitted that the Hope Natural Gas Company had a reputation of paying high wages. In this connection, it may be stated that it is a matter of common knowledge that numerous contracts for the construction of

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state highways have been let in the section of the state in which the Company's lines are laid, and that the prevailing price for common labor has been, and is, 25 to 35 cents per hour.

From what has been said, we are of the opinion that Mr. Smith's estimate of Items 7 and 8 should be reduced at least 10 per cent.

Item 9, Field Measuring Equipment. We are of the opinion that this item should be reduced 5 per cent, for reasons hereinafore mentioned and reasons hereinafter mentioned, particularly regarding house meters.

Transmission System

Item 10, Land. It appears that the Company owns two tracts of land consisting of about sixteen acres each, upon which the Thomas and Forman compressor stations are located. Mr. Brady testifies that three acres are sufficient for both compressor stations; that a much smaller portion of the land is actually being used for this purpose; that the compressor stations are located on the corners of the tracts of land; and that the land is worth \$125 per acre. It is difficult to determine, from the record herein, just how Mr. Smith arrived at the value of this land. It is believed that \$2,300 is a reasonable value to place on this property.

Item 11, Transmission Rights-of-Way. According to Mr. Brady, nothing was paid for a part of this right-of-way, and the part purchased should not exceed \$1 per rod. The total cost of this item, and Item 5, as hereinbefore stated, is \$96,099.44. We are of the opinion that \$80,000 would be a reasonable value for this item, which amount, added to the \$35,000 for Item 5, makes a total of \$115,000, as compared with \$96,099.44, the original cost, and \$106,447, estimated by Mr. Brady.

Item 12, Compressor Station Structures; Item 13, Measuring Structures and Item 14, Other Structures; have each been reduced 5 per cent, for reasons applying to Item 6, or Field Measuring Station Structures.

Item 15, Compressor Station Equipment, and Item 16, Measuring Equipment, have each been reduced 5 per cent, for reasons applying to Item 9.

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Item 17, Line Equipment. This item has been reduced 10 per cent, for reasons applying to Items 7 and 8, and the further reason that Mr. Brady, as hereinbefore stated, estimated the reproduction cost of this item to be 25 per cent less than Mr. Smith.

Distribution System

Item 18, Land. No reduction has been made in this item.

Item 19, Regulator Structures, and Item 20, Other Structures, have each been reduced 5 per cent, for reasons applying to Item 6.

Item 21, Regulators. This item has been reduced 5 per cent, for reasons applying to Item 9.

Item 22, Line Equipment, and Item 23, Service Line Equipment, have each been reduced 10 per cent, for reasons applying to Items 7 and 8, and an additional 2 per cent, because of the fact that all of these lines are laid in trenches having an actual depth of 40 per cent less than that used by Mr. Smith in estimating the reproduction cost of the trenches and back filling.

Item 24, Meters. The cost of an Equitable Meter, No. 2, is \$9. Mr. Smith estimates the reproduction cost of an equitable meter, including purchase, engineering and supervision; freight; hauling; proving and testing, to be \$11.92. In other words, he adds \$2.92 for the items mentioned. It is believed that Mr. Smith's estimate of the cost of meters is at least 5 per cent too high, therefore, we have reduced this item 5 per cent.

[6] Item 25, Meter Installation. Mr. Smith estimates that it will cost 50 cents to install a meter. Mr. Brady estimates that it will cost 25 cents. Perhaps $37\frac{1}{2}$ cents would be fair; consequently, we have reduced this item 25 per cent.

General Equipment

Item 27, Office Equipment. The record discloses that the total cost of all office equipment up to and including the year 1925 amounted to \$16,011.42; and that \$8,355 of this amount was expended in the year of 1925. The record further discloses that all of the furniture that has ever been purchased by the Company, or its predecessors, is included in this account, as P.U.R.1928B.

no retirements have ever been made. From what has been said, we are of the opinion that to allow the total cost of all of the property included in this item, or \$16,011.42, would be fair.

Items 28, 29, 30, 31, and 32 have not been reduced.

The result of the aforementioned reductions from Mr. Smith's estimates is set out in Table No. 1, resulting in an estimate of cost of reproduction of the physical property new, but without overheads at \$6,304,452.

Value of Leaseholds

[7] Mr. Smith, by the application of Boyle's Law, estimates that the volume or recoverable gas in the property leased by the Company is 11,436,000 M cubic feet. His estimate is based on continued production down to a rock pressure of twenty-five pounds, the reduction in rock pressure, and past production. The record is not clear, however, as to just how Mr. Smith arrived at the original rock pressure, of the company's wells, as no record of the rock pressure at the time the wells were put in service, was made. He states that he took the rock pressure from the Company's records, but no witness testified as to just how this pressure was taken or by whom. Mr. Smith valued the recoverable gas at \$509,885, based on the average price the applicant was paying for its purchased gas on December 31, 1925, less expense of production.

Mr. C. E. Krebs, mining engineer and former assistant state geologist, also testified as to the value of the Company's leaseholds. He estimated the amount of recoverable gas, by taking it at a lower pressure than estimated by Mr. Smith, at 14,136,000 M cubic feet, and valued the gas at \$650,000. The rock pressure used by Mr. Krebs was furnished him by Mr. Smith. Mr. Krebs also used Boyle's Law in his estimate of the recoverable gas in the Company's leaseholds.

We understand that by the application of Boyle's Law, it is assumed that the gas is confined in a certain container or area, and that its only means or avenue of escape is through the Company's wells, which is not true in this case.

The record discloses that the gas-producing sands, in which the Company's wells are drilled, are honeycombed with producing wells owned by other companies and independent operators, P.U.R.1928B.

and that the wells differ in size. It is, therefore, obvious that Boyle's Law could not reasonably be applied to the conditions under which the Company produces its gas.

Mr. Boyd E. Horner, civil engineer and oil and gas operator and producer, testifying for the Company on October 27, 1926, expressed the opinion that the 4,538 acres of undeveloped leases held by the Company had a value, as of December 31, 1925, of \$28,802, and that the 9,872 acres of developed leases held by the Company had a value of \$563,250.

Mr. Horner also testified regarding the sale of certain gas and oil properties. In practically all cases cited by him, the oil rights were sold along with the gas rights and none of the property was contiguous to, or in close proximity to, the leases held by the Company, and practically all of the sales to which he referred were made years ago.

The record discloses that Mr. Mayers, general manager of the Company, testified on October 26, 1926, that 2,347 acres, included in the undeveloped acreage of 4,538 acres about which Mr. Horner testified, had been surrendered prior to July 1, 1926; and the report of the Company to the Commission, for the year 1926, discloses that the entire undeveloped acreage, valued by Mr. Horner at \$28,802, with the exception of 65 acres, was surrendered during the year 1926. If Mr. Horner was as familiar with the leases held by the Company as his testimony would indicate, he must have known, or at least should have known, that the 2,347 acres of the Company's undeveloped leases had been surrendered at the time he was testifying.

It has been pointed out in this case that this same Mr. Horner expressed his willingness to purchase the undeveloped leases from the Company at the value placed on them by him, or \$28,802, as shown by the following from brief of counsel for the Company:

"Protestants would ask the Commission to disregard, as we contend it cannot, the testimony of Mr. Horner as to the direct fact that these leaseholds have an actual market value of \$592,052, and that he personally would pay that amount for them, which the record shows he is abundantly able to do, because of P.U.R.1928B.

the large purchase of gas he makes for industries in and around Clarksburg."

If it were true that Mr. Horner was willing and able to purchase the Company's undeveloped leaseholds at \$28,802, it is difficult to understand, in view of the fact that the consumers had been required to pay \$19,000 carrying charges on these leases, just why the Company elected to surrender the undeveloped leases instead of selling them to Mr. Horner.

It is manifest, from what has just been said, that the undeveloped leaseholds, with the exception of the 65 acres which are a negligible part, had no value at the time Mr. Horner was testifying, and that his opinion, with reference to the value of the Company's developed leaseholds, should be weighed with caution; in fact, it appears to have little, if any, value.

[8] If the Company had purchased the leaseholds, and no rents or royalties were required to be paid by its consumers, it may be that the testimony of Mr. Smith, Mr. Krebs, and Mr. Horner should be given such consideration as it appears to be entitled in placing the value thereon; but the amount actually paid for the leases is negligible as compared with the amount of rents and royalties paid by the consumers. The total amount paid by the Company, for its leases, is said to be \$63,754, \$48,400 of which were paid by the predecessor companies to the Eastern Oil Company, which was the parent company, therefore, it is questionable whether this payment was justified. The rents and royalties, which were charged to operating expenses and paid by the Company's consumers, amounted to \$943,238.66, as of June 30, 1926.

In addition to having paid the rents and royalties in the development of this property, the consumers were required to pay \$237,415.75, for dry holes, as the total cost of drilling dry holes is charged to operating expense. Adding this amount to the amount paid for rents and royalties, we get a total of \$1,181,754.41, which the consumers have paid for the purpose of developing and carrying the leases that the Company now proposes to value.

It is difficult to see how it could be possible to place a value on leases that would not be influenced by the rates the Company

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is permitted to charge. If this is true, the value would influence the rate, and in turn the rate would influence the value. If, indeed, any value should be attached to the leases over and above the actual amount invested in them, it must be based upon the value of the interest held in the real estate. Just what that value is cannot be determined from this record.

If the amount of gas in the ground is to be estimated and valued under such conditions as exist here, then there is a much more compelling reason why water gathered from a water shed and impounded in a dam should be valued at so much per gallon. This, so far as we are advised, has not been done, and nothing more preposterous could be thought of unless it would be valuing an unknown quantity of gas in the ground, which has no owner while it remains in the ground but belongs to the person or company fortunate enough to recover it.

In the case of *Natural Gas Co. v. Public Service Commission*, 95 W. Va. 557, P.U.R.1924D, 346, 356, 121 S. E. 716, Judge Meredith, speaking for the Court, said:

"While we held in *Charleston v. Public Service Commission*, 95 W. Va. 91, P.U.R.1924B, 601, 120 S. E. 398, that in a rate case a utility is entitled to include in its present fair value, as a rate base, appreciation in the value of its leaseholds over investment cost, yet the evidence thereof must not be based upon, but must be independent of, the rates of return or earnings. Since the burden of showing the necessity or fairness of the proposed increase in rates is upon the company, a like burden is imposed upon it to show the value of its leaseholds over investment cost, as their value forms a component part of the rate base upon which the return is calculated. . . .

"If the leaseholds increase in value as the gas is exhausted, to be logical the company should not ask for any depreciation allowance thereon. There are so many elements of uncertainty and speculation that enter into opinions regarding the value of gas leaseholds, and their value is so constantly shifting and changing that, as we said in *Charleston v. Public Service Commission*, *supra*, no appreciation in their value over investment cost should be allowed in ratemaking cases, unless the circumstances be exceptional. . . .

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"Now during the whole life of the utility the rentals to keep these leases alive have been paid by the public; since the Commission has been regulating public utilities, these rentals have been charged to operating expenses. In all such inquiries, it would be well for the Commission to ascertain the amount of rentals so paid, and the amount thereof should be considered and given due weight. If the delay rentals would equal or exceed the excess of present values over investment cost of the leaseholds, then there should be no allowance made for the increase in values. Not to do so would in effect permit the company to capitalize the rentals paid by the public as operating expenses, and require the public to pay a return on them. From the testimony it appears that they now run from \$1 to \$1.50 per acre annually; it does not appear from the record, but it is quite possible that the rentals already paid far exceed the total valuation placed on these leaseholds by Mr. Wyer. This is a circumstance that can not be ignored. For the foregoing reasons, we think that Mr. Wyer's valuation should be rejected; the investment cost of the leaseholds should be regarded as the basis for fair value, subject to depreciation charge as will be discussed hereafter."

Much has been said about the hazards incident to the natural gas business. The record discloses that many, if not all, of the hazards, in so far as the operation of this property is concerned, have been removed. Provision has been made, through the life of the Company and its predecessors to take care of at least the ordinary hazards in the business; and that having been done it would appear that the officers have not been niggardly with the stockholders of the Company in the accumulation of profits for them, as the record shows that the Company's predecessors, after setting up 5 per cent annually for depreciation, realized more than 8 per cent return upon the fair value of the property, to which has been added 10 per cent for going value and working capital, as will hereinafter appear.

It may be that the leaseholds have appreciated in value since they were obtained by the Company. However, it is impossible to tell, from the record, just what leases included in the invest-
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ment of \$63,754 are now being held and operated by the Company, as many of the leases have been surrendered.

From all that has been said regarding this matter, we are of the opinion to allow, for this item, \$63,754, which is the total amount invested in leaseholds during the entire life of the property.

Overheads

The Company, at the request of the Commission, filed Smith Exhibit No. 18, purporting to show the actual amount estimated for overheads by Mr. Smith in his reproduction cost of the property. The amounts making up the total estimated overhead costs, as shown by Smith Exhibit No. 18, are: .

Field engineering, supervision and miscellaneous field costs ..	\$676,365.00
Omissions and contingencies	115,083.00
Interest, taxes and general office	828,812.00
Promotion, organization and cost of financing	863,317.00
Total	\$2,483,577.00

It will be observed that the estimated overheads are in excess of 35 per cent of the estimated reproduction cost of the physical property. It may be pointed out that, in addition to the overheads set out in Smith Exhibit No. 18, there is included, and allowed, in the reproduction cost of the physical property items for delays due to bad weather, securing labor, waste and breakage of pipe, and insurance, which are ordinarily included in estimates for overheads.

The record discloses that the amount actually expended for overheads during the entire life of the property is \$172,000, approximately. This amount, compared with the amount estimated by Mr. Smith, shows the fallibility of basing the value of property upon estimated reproduction cost alone.

The question of overheads was discussed in the following cases:

United Fuel Gas Co. v. Public Service Commission, 14 F. (2d) 209, P.U.R.1927A, 707, 719; Columbus Gas & Fuel Co. v. Columbus, 17 F. (2d) 630, P.U.R.1927C, 639, 656.

In the first case cited, the late Judge Rose, speaking for the Court, said:

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"There is no possible question that in almost all of these rate cases the overhead charges included in the estimated cost of reproduction greatly exceed any sum that the utility actually paid out for such purposes. A large and widely distributed plant is ordinarily a growth extending over many years. Its property is managed by its officers, and its construction is financed in installments. The large overheads estimated by the experts are simply not incurred. . . .

"A well-managed public utility almost always builds up an organization which, as part of its every day work and without appreciable additional cost, can and does superintend the making of such additions and extensions as from time to time may be required. The possession of such a staff is not the least important asset going to make up what is called going concern value. Perhaps one of the reasons why reproduction cost, although one of the weightiest elements in the determination of present fair value, is not necessarily controlling, is the very fact that, in arriving at it, the experts always include an expenditure for overheads far in excess of any which the utility ever incurs."

In the second case cited, Judge Hough, speaking for the Court, said:

"Except for the overhead cost of maintaining an executive, engineering, bookkeeping, and supervisory organization, which has heretofore received treatment, the Master was correct in eliminating these various items of value. With the plan conceived by the company's engineers, creating a basic structure upon which to impress, attach, and superimpose every and all conceivable and imaginable items of cost, like barnacles on a ship's hull, the Court is not in sympathy."

The record discloses that the engineering required in the building of the Company's plant is not recognized as high-class engineering; that the property, while in the course of construction, is not taxed, with the exception of material on hand; that interest is not paid until the money is actually required; and it is probable that the value of the property not now in use, but included in the inventory, would exceed in value the omissions and contingencies, therefore, nothing will be allowed for this particular item.

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The weight of authority appears to be against allowing anything for financing:

Galveston Electric Co. v. Galveston, 272 Fed. 147, P.U.R. 1921D, 547; Winona v. Wisconsin-Minnesota Light & P. Co. 276 Fed. 996, P.U.R.1922D, 461; Reno Power, Light & Water Co. v. Public Service Commission, 298 Fed. 790, P.U.R.1923E, 485; Duluth Street R. Co. v. Minnesota R. & Warehouse Commission, 4 F. (2d) 543, P.U.R.1925D, 226.

In Reno Power, Light & Water Co. v. Public Service Commission, *supra*, at p. 494 of P.U.R.1923E, the Court said:

"There is no evidence that any brokerage was ever paid. Twenty thousand, seven hundred twenty-two dollars, the amount fixed by the witness Wentworth, is purely an estimate by an expert. One man with abundant capital or excellent credit may be able to construct a plant without employing brokers or issuing bonds; another with little capital and but indifferent credit may be obliged to pay large fees for marketing his securities, and realize from them much less than their face value. This cost of obtaining capital to erect a public utility plant is not property which will be used in serving the public. It is not basic value. It is an index of the promoter's lack of credit and capital, rather than of reasonable value."

[9-12] It is obvious that certain overhead costs will be incurred in the the construction of the property. We are of the opinion, however, that the amounts set up for the different items in Smith Exhibit No. 18 are far in excess of the amounts necessary for the purposes mentioned, and we fix 5 per cent for engineering, 6 per cent for interest during construction, 2 per cent for corporate costs, 1 per cent for legal, making a total of 14 per cent, which has been applied to all of the items, with the exception of general equipment, as shown on Table No. 1, a total estimate for overheads of \$875,639, making the total estimate of reproduction new of the physical property \$7,178,334; to which may be added \$63,754 for leaseholds; a grand total of \$7,242,088.

[13] We have not added overhead costs to the general equipment, for the reason that the expense incurred for interest during construction, engineering, and legal would be negligible, P.U.R.1928B.

as this property would not be purchased until the plant was ready to operate. It may be that something should be added to this property for overheads, but, since we have applied the 14 per cent to land and other items, we are of the opinion that the total amount allowed for overheads is sufficient.

Accrued Depreciation

We come now to consider one of the most important elements in this case, about which there is a wide difference of opinion. It is difficult to understand how witnesses, equally qualified and with honesty of purposes, after examining the same property, could differ so widely regarding its physical condition.

The Company appears to present opposing theories of depreciation. Mr. Jirgal, in support of his contention that $5\frac{1}{2}$ per cent per year should be allowed for future depreciation, testified that the books of the Company show that the average life of the wells drilled by the Company's predecessors is twelve years; that the investigations he has made lead to the conclusion that the average life of the meters is fifteen years; and that five miles of the distribution lines were relaid in the year 1925, indicating that the major renewals, regarding lines, are just beginning, which supports the contention of the protestants that the distribution and service lines are in bad condition and should be depreciated 60 per cent to 70 per cent.

[14] Mr. Smith, in support of his contention that the Company's property is in 85.60 per cent condition, proceeds upon the theory that when the wearable parts of property are replaced, it is in 100 per cent condition. With this theory we do not agree. The record discloses that Mr. Smith examined the pipe lines of the Company located in this state at 361 places, and that ninety-one of the places where examinations were made, the pipe was reported to be in 100 per cent condition, although it had been in use for a period of twenty years.

The record also discloses that only eight examinations of the 12-inch, and four examinations of the 10-inch, main transmission lines were made in this state, although there are approximately ninety miles of this line in West Virginia.

The record further discloses that Mr. Smith did not make an
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examination of the 12-inch line between Thomas and Keyser, a distance of about fifty-five miles, or considerably over half of the entire line located in this state. We cannot approve this method of examination, particularly in view of the fact that this line extends through sections underlaid with coal, and that soil conditions are constantly changing.

At the request of the Company, Mr. Imboden, engineer for the Commission, was permitted to accompany Mr. Smith while making his examination of the pipe lines where openings had been made by the Company, in order to prevent the reopening of the trenches in case the Commission decided to have its engineering department make an observed examination of the property to determine its condition.

Later, it was decided, and so stated, at the first hearing of this case, that the Commission's engineers would not be able to make an examination of the property to determine its physical condition, which was after Mr. Smith and Mr. Imboden had examined the pipe at the openings made by the Company.

Mr. Imboden, at the request of the Company, made a report in which he expressed the belief that a sufficient number of observations were made to definitely determine the average condition of the pipe constituting the transmission and distribution system. With this belief, we are not in accord.

It may be that a sufficient number of examinations of the distribution lines were made to determine their condition, provided the examinations were made at representative points, but we cannot agree that four examinations of the 10-inch pipe and eight examinations of the 12-inch pipe were sufficient to determine the physical condition of ninety miles of pipe lines.

There are about eighty miles of 12-inch pipe and seventy-five miles of 3-inch pipe in West Virginia. Eight examinations were made of the 12-inch pipe and 128 examinations were made of the 3-inch pipe. Just why it was found necessary to make so many examinations of the 3-inch pipe and so few of the 10-inch and 12-inch pipe, is not explained.

Mr. Brady and other witnesses for the protestants point out numerous places where the pipe is badly deteriorated and leaking, and state that when many of the examinations were made

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by them they are accompanied by a representative of the Company. They also point out that, by reason of deterioration of the pipe, it was easily penetrated by the use of the handle of a shovel in one instance, and a sledge in another, and that a 2-inch pipe was cut in two with a grader pulled by a Fordson tractor. They further state that in places where the dirt was removed from the pipe, the pipe adhered to the dirt, leaving holes through which the gas escaped.

Mr. Brady also testified that the soil in this section of West Virginia had a very deleterious effect upon pipe, causing it to deteriorate rapidly. He also pointed out that Mr. Smith found the pipe on First street, in Elkins, to be in 95 per cent condition; that the street was four blocks long and that the pipe on two blocks of this street was found to be so badly deteriorated that it was necessary for the Company to replace the pipe shortly after Mr. Smith had made his examination.

It is significant that over 500 openings made by the Company did not disclose a single leak or a condition such as testified to by witnesses for the protestants.

If the opinion of witnesses for the Company is to be accepted, the pipe lines would have a life of two hundred years. If the opinion of the witnesses for the protestants is to be accepted, the life of the distribution lines, service lines and at least parts of the transmission lines, is practically ended. These statements are difficult to reconcile, but, if the pipe exhibited by the protestants, which was said to have been removed from the Company's lines, is in any way representative of the lines now in service, we would be forced to the conclusion that the protestants are more nearly correct in their estimate of the depreciated condition of the Company's lines.

Smith Exhibit No. 6 discloses that one examination was made of the service lines in Buckhannon; that one examination was made of the service lines in Hodgesville; that there are 1538 services in Buckhannon and 34 services in Hodgesville; that the services in Buckhannon were found to be in 60 per cent condition; and that the services in Hodgesville were in 100 per cent condition. Mr. Smith added the 60 and 100, divided the total by 2, and found the services in the two towns to be in 80 per cent condition.

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condition. This method is so palpably wrong that further reference need not be made.

At a former hearing involving this same property, Samuel S. Wyer, consulting engineer and valuation expert of Columbus, Ohio, witness for the applicant, expressed the opinion that the property had depreciated 28 per cent, or 3.20 per cent per year. Continuing this same percentage of depreciation, the property at this time would be depreciated approximately 43 per cent.

Mr. Smith depreciated Item 1, Well Construction, and Item 2, Well Equipment, 43.57 per cent. Mr. Williamson, basing his opinion on the total amount of gas sold, the amount remaining in the ground and the line loss, finds that the Company's gas reserves have been depleted approximately 89 per cent. Mr. Hall, engineer for the Commission, at the request of the protestants, estimated the present condition of the Company's wells; and, basing his opinion upon the average age and gas produced by the abandoned wells, as compared with the gas produced by the wells now in service and the total amount of gas produced, as compared with the gas remaining in the ground, finds the wells should be depreciated 89.74 per cent.

Mr. Smith, in arriving at the present percentage condition of the wells, estimated the life of a well to be twenty-five years. We are unable to find anything in the record that would justify the fixing of the life of a well at twenty-five years. Mr. Jirgal, as hereinbefore stated, finds the average life of a well to be twelve years. According to Mr. Williamson, the average age of the wells now in service is eleven and two-thirds years, which would indicate that Mr. Jirgal was too low. It is believed that Mr. Smith is too high. Perhaps to fix the average life of a well as eighteen years would be fair.

Mr. Meals testified that the average life of a casing in a well, located in this territory, is twelve years. We are of the opinion, from what has been said concerning this matter, that the wells and equipment should be depreciated 50 per cent; and that Item 3, Drilling and Cleaning Equipment, should be depreciated 48 per cent, which is the amount of depreciation fixed for this item by Mr. Smith.

[15] We are of the opinion that all structures should be de-

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preciated approximately 2 per cent per year, therefore, we have depreciated Item 6, Field Measuring Station Structures, 40 per cent.

[16] Item 5, Field Rights-of-Way; Item 7, Field Line Construction; Item 8, Field Line Equipment; have been depreciated 40 per cent. Our reasons for not applying the same percentage of depreciation to these items as is applied to the wells is due to the fact that a part of the field lines and rights-of-way may be used to gather gas after the Company's wells are exhausted, otherwise, we would have depreciated this property 50 per cent.

It is true that physical depreciation should not be applied to the rights-of-way; neither should it be applied to the hole in the ground. Mr. Smith depreciated the hole in the ground 43.57 per cent, applying of course functional depreciation. If functional depreciation should be applied to the hole in the ground, it should be applied to rights-of-way, which will be useless after the gas is exhausted; therefore, we have depreciated Field Line Rights-of-Way 40 per cent, or the same as Field Line Equipment.

[17] Item 9, Field Measuring Station Equipment. This item has been depreciated 40 per cent, or approximately 2 per cent per year. The record is rather vague regarding this item and Item 21, and also Item 26, but what will be said later regarding meters applies to these items.

[18] Item 4, Other Investment; Item 10, Land; and Item 11, Transmission Rights-of-Way, have not been depreciated.

[19] Item 12, Compressor Station Structures. The average age of compressor stations is in excess of fourteen years. We are of the opinion that this property should be depreciated about 2 per cent per year, or 25 per cent.

Item 13, Measuring Station Structures, and Item 14, Other Structures, have been depreciated 50 per cent by Mr. Smith, and have not been changed.

Item 15, Compressor Station Equipment. This item is classed as machinery, and, in our opinion, from what has been said by Mr. Brady, and in view of the fact that the depreciation on this property was fixed by a representative of the Worthington Pump & Machinery Company, who did not testify in this P.U.R.1928B.

case, and the further reason that Mr. Smith, in depreciating this property, as well as all other property, did not take into consideration deterioration due to age or crystallization, this property should be depreciated 25 per cent, which is less than 2 per cent per year.

[20] Item 17, Transmission Line Equipment. In view of the cursory examinations made of this property by Mr. Smith, the testimony of witnesses for the protestants regarding the condition of parts of this property, and the fact that it is generally recognized that a certain amount of deterioration is going on in iron and steel pipe, which is not disclosed by a superficial examination, we are of the opinion that this property should be depreciated 25 per cent or approximately 1 per cent per year.

Item 22, Distribution Line Equipment, and Item 23, Service Line Equipment. Considerable evidence has been introduced concerning these two items. The Company contends that this property should be depreciated 8.20 per cent, which, applied to the service lines, is hardly consistent with the practice of the Company to replace its service lines in towns where streets have been paved. If the service lines are in the condition claimed by the Company, it certainly would not be necessary to replace them, as their life would probably be two or three times that of the paving. From all that has been said concerning the condition of the service lines and distribution lines, we are of the opinion that these items should be depreciated 40 per cent.

Item 24, Meters, and Item 25, Meter Installation. Mr. Smith did not examine the meters. He estimated that the wearable parts were in a certain condition, and, by renewing these parts, the meters would be in 100 per cent condition. Mr. Jirgal found that over 500 meters had been retired from service, and that the average life of a meter is fifteen years. This being true, it would appear that approximately 1900 of the meters now in service have reached the point where it will be necessary to replace them. This assumption is borne out by the fact that Mr. Williamson's report shows that the Company expended only \$27,873, for meters during the six years from 1915 to 1920, inclusive, during which time it added over 5000 consumers; that during the six years from 1921 to 1926, inclusive, in which time

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less than 1900 consumers were added, it expended for meters \$55,180; and that \$22,500 of this last amount was expended during the years 1925 and 1926, indicating that many renewals were being made. We are of the opinion that these items should be depreciated 40 per cent.

[21] Item 27, Office Equipment, having been reduced to the actual investment, and, considering the fact that over half of this equipment was purchased in the year 1925, we are of the opinion that the appreciation in the old furniture would equal its physical depreciation, therefore, we have not depreciated this item.

We are of the opinion that the depreciation applied to Items 29, 30, 31, and 32 is supported by the record and is reasonable.

It is noticeable that Mr. Smith depreciates the small building 50 per cent and the compressor station buildings less than 5 per cent. The unusual line loss suffered by the Company, which represents about 25 per cent of the total gas produced and purchased, indicates that the Company's system is not in a good state of repair and that numerous leaks are occurring in its lines.

In the case of the Columbus Gas & Fuel Co. v. Columbus, 17 F. (2d) 630, P.U.R.1927C, 639, 651, the Court, in discussing the question of accrued depreciation, says:

"Concerning this troublesome subject much conflict in theory and opinion exists. Missouri ex rel. Southwestern Bell Teleph. Co. v. Public Service Commission, 262 U. S. 276, 294, 67 L. ed. 981, P.U.R.1923C, 193, 43 Sup. Ct. Rep. 544, 31 A.L.R. 807. Age and usage to which the metal has been subjected, even under favorable soil conditions, such as found in Columbus, together with the corrosion, electrolysis, metal strain, fatigue, and crystallization to which the mains have been subjected for many years, just naturally present themselves with undeniable force, to be taken into consideration as an element of depreciation. The element of age is considered as an essential in arriving at a proper, just, and fair accrued depreciation of the property. It is an element that is generally known and must be accepted—the result of judgment applied to common knowledge."

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The deductions from our estimate of reproduction cost new, representing accrued depreciation, are shown in Table No. 1, a total of \$2,437,698, for actual accrued deterioration.

[22]- The protestants contend that the transmission lines and compressor stations have a much greater capacity than that required to transport the gas now being sold by the Company, and that the excess capacity should be taken into consideration when depreciating the property.

The record shows that, in the year 1913, the Company's predecessors transported 9,499,832,000 feet of gas with this same equipment; and that the Company, in the year 1926, sold 1,782,731,000 feet of gas, which is about one-fifth the amount of gas sold by its predecessors in the year 1913.

The Company estimates that its gas production will be exhausted within ten years, but contends that it will be able to purchase gas for a longer period. We are of the opinion that it is reasonable to conclude that the property will cease to function as a natural gas plant at the end of sixteen years; and the fact that a part of this property may, at some future time, be used for transporting artificial gas is too remote and uncertain to be seriously considered at this time. Besides, it is believed that it is not practical to furnish artificial gas to the West Virginia consumers.

Mr. Brady testified, for the purpose of showing the excess capacity of the compressor stations and main transmission line, that this equipment could be replaced with equipment adequate to render the service now required by this equipment for less than \$900,000, which includes compressor stations, which may be compared with over \$2,500,000, the estimated reproduction cost of this property.

Mr. Meals, witness for the Company, who has had at least thirty years experience in the natural gas business, did not agree with Mr. Brady that the plant had an excess capacity. He expressed the opinion that the Company had an ideal plant. A careful reading of his testimony, however, discloses that he is not familiar with the territory through which the Company's plant is constructed; the conditions under which it has been operated; and that in a number of instances, the figures upon

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which he bases his estimates are not correct. It is believed that Mr. Brady's estimate is too low. However, the fact remains that the Company's predecessors, in the year 1913, transported five times the quantity of gas now being transported by the Company, which would indicate that the Company could easily transport with its present equipment at least twice the amount of gas now being sold by it. The excess capacity of the plant was considered by our supreme court of appeals in the case of *Elkins v. Public Service Commission*, 102 W. Va. 450, P.U.R.1927B, 270, 135 S. E. 397.

In the case of *Idaho Power Co. v. Thompson*, 19 F. (2d) 547, P.U.R.1927D, 388, 437, the Court, in discussing the question of fair value and depreciation, says:

"Fair value implies a consideration of all factors which would be regarded as material in negotiating a sale and purchase of such property. Wear, decay, deterioration, obsolescence, inadequacy, and redundancy would all undoubtedly be considered as factors."

Considering all that has been said for the record concerning the excess capacity of the Company's plant, we are of the opinion that \$2,000,000, representing the Main Transmission Line Equipment, Item 17, and the full amount of Item 15, Compressor Station Equipment, should be depreciated 10 per cent, by reason of redundancy or excess capacity.

[23] Mr. Covell, witness for the Company, when making his apportionment of the property between the states, did not take into consideration the line loss which amounts to about 25 per cent of the total gas produced and purchased. We are of the opinion that the apportionment applied to the transmission system should be applied to the line loss, which would result in apportioning 55.5 per cent of the production system to West Virginia and 44.5 per cent to Maryland. We have accepted Mr. Covell's apportionment of the remaining property, as shown in Table No. 1.

Based upon the inventory made by Sanderson and Porter, and introduced by Mr. Smith, the proof of which appears to be of doubtful value, we find the estimated reproduction cost of the Company's property, as of December 31, 1925, to be \$7,242,-
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088, and the estimated reproduction cost of the Company's property apportioned to West Virginia to be \$2,321,269, as shown in Table No. 1. It will be observed that no deduction is made in Table No. 1 on account of the excess capacity of the plant.

It has been stated that the main transmission line and compressor station structures and equipment, by reason of redundancy or excess capacity, should be depreciated 10 per cent, in addition to the 25 per cent shown in Table No. 1, or a total of 35 per cent. The estimated reproduction cost of the main transmission line, including 14 per cent for overhead, is approximately \$2,000,000, 10 per cent of which is \$200,000. Forty-four and one-half per cent of this amount, or \$89,000, has been apportioned to West Virginia.

The estimated reproduction cost of the compressor station structures and equipment, including 14 per cent for overhead, is \$618,343, 10 per cent of which is \$61,834. Forty-four and one-half per cent of this amount, or \$27,516, has been apportioned to West Virginia. Adding this last-named amount to the \$89,000, we get a total of \$116,516 to be deducted from the estimated reproduction cost of the property apportioned to West Virginia in Table No. 1. The record discloses that, during the years 1910 to 1924, inclusive, it was the practice of the Company's predecessors to charge the drilling cost of wells to operating expenses, and that, during this period, 124 wells were drilled.

Table No. 1 discloses that we have found the estimated reproduction cost of well construction, depreciated, to be \$375,574, which represents the drilling costs of 148 wells, or \$2,538 per well. Multiplying this amount by 124, the number of wells charged to operating expense, we get \$314,712, 55½ per cent of which, or \$174,655, has been apportioned to West Virginia in Table No. 1.

Our supreme court of appeals, when considering this question in the case of *Natural Gas Co. v. Public Service Commission*, decided February 26, 1924, 95 W. Va. 557, P.U.R.1924D, 346, 358, 121 S. E. 716, said:

"He totally ignores the fact that practically two-thirds of the cost of all the foregoing items have already been paid by the public as operating expenses. All the items for labor, teaming, P.U.R.1928B.

freight, drilling, well shooting, road building and placing the casing and tubing, have been so paid. The materials, such as rig, casing, and other machinery, have been carried to investment account, and the public has been paying for their use; so that we do not find a single item in this list, for which the public has not already paid, or does not pay for its use annually in the rates charged. But he takes the position that this makes no difference; for example, if the company drills a gas well at a cost of \$5,300 and this drilling cost is immediately paid by the public in rates, he treats it as though the company paid it, because the well belongs to the company, and he says it is worth that amount; that that is its value to the company. For example, he uses the oft-repeated illustration 'If the property had been willed to them it would have made no difference; it is their property, and my function was to secure the present fair value of that property as of the date used in the appraisal.' Of course, this is an evasion of the question. If the \$5,300 well had been willed to the company, it would not have cost the public anything, and the company would be entitled to include that value in its estimate of the fair value of its property. But we can not ignore the fact that most of the enumerated items have been paid by the public; they were not willed to or given to the company; their payment was not a voluntary but an involuntary, an enforced, payment, a payment which the public could not avoid. Theory in such cases must give way to fact. Equity and fair dealing require that at least two-thirds of the valuations placed on these natural gas wells by the witness be totally disregarded in ascertaining the fair value of the company's property on the reproduction theory; to regard all of it would require the public to keep paying a return and a depreciation charge on \$450,400 of it, which it has already paid."

The record does not show just how the labor costs of the Braxton line were handled, but it appears that the Company's predecessors contended that the life of the Braxton field was comparatively short, and that the Commission permitted them to amortize the labor costs over a period of five years. It may be as contended by the protestants, that this property should

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not be included in the capital account. However, we have included this item in the value of the Company's property.

Property not Used and Useful

[24] This history of the property now owned and operated by the Company discloses that, after constructing the main transmission line, it was necessary to construct another or parallel line in order to furnish gas to the industrial consumers. Later, the supply of gas became somewhat exhausted. It was found necessary to curtail the amount of gas furnished industrial consumers; besides, in time the price at which it appeared to be necessary to sell the gas made its use prohibitive for industrial purposes, therefore, the parallel line is no longer useful, for the purpose for which it was originally constructed, and it has been pointed out that the parallel line is not now connected.

In view of the fact that it has been decided that the main transmission line, exclusive of the parallel line, has a capacity in excess of that required to transport the gas now being sold by the Company, we are of the opinion that the estimated reproduction cost of the parallel line should be deducted from the estimated reproduction cost of the property.

The estimated reproduction cost of the parallel line is \$348,244. This amount should be reduced 10 per cent, to compare with the reduction heretofore made in the transmission line, leaving the amount \$313,420, to which should be added 14 per cent for overheads, making the total estimated reproduction cost of the parallel line \$357,298. Depreciating this amount 35 per cent, or \$115,054, for actual physical depreciation and excess capacity, which deduction was heretofore made from the estimated reproduction cost of the transmission line, we get \$242,254. Forty-four and one-half per cent of this amount, or \$107,803, has been included in the amount apportioned to West Virginia.

As hereinbefore stated, we find the estimated reproduction cost of the property apportioned to West Virginia, applying actual accrued depreciation as shown in Table No. 1, to be \$2,321,269, from which amount the following deductions should be made:

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Wells and equipment	\$174,665
Parallel line	107,803
Total	\$282,468

leaving the depreciated value of the property apportioned to West Virginia, \$2,038,801.

If we deduct the further accrued depreciation of 10 per cent, for redundancy or excess capacity, as applied to certain parts of the plant, the following deductions should be made from the value of the property apportioned to West Virginia, or \$2,321,269:

Further accrued depreciation	\$116,516
Wells and equipment	174,665
Parallel line	107,803
Total	\$398,984

leaving the depreciated value of the property apportioned to West Virginia \$1,922,285.

[25] In this case, depreciation is presented in another form, which should be applied only, if at all, to utilities engaged in operating a wasting property, parts of which are in a fair state of preservation when the commodity sold is exhausted, necessitating the abandonment of the plant as a whole and reducing its value to that of junk.

This element was recognized by Mr. Smith when depreciating the Company's wells and equipment. The hole in the ground, the drilling of which is the principal cost of a completed well, is just as good as the day it is put in use, perhaps twenty years ago, and will remain so until its usefulness is ended by reason of the exhaustion of the gas, yet Mr. Smith, as hereinbefore stated, depreciated the wells 43.57 per cent.

Utilities engaged in the natural gas business have urged, in practically all cases, that a sufficient amount, based on the life of the property, should be set up annually to retire the investment in the property at the end of its useful life, which of course was based upon the assumption that a sale of a certain part of the property was being made each year.

In the case of *United States v. Ludey*, 274 U. S. 295, 71 L. ed. 1054, 47 Sup. Ct. Rep. 608, 610, decided May 16, 1927, the Court, in discussing depreciation and depletion, says:
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"The depreciation charge permitted as a deduction from the gross income in determining the taxable income of a business for any year represents the reduction, during the year, of the capital assets through wear and tear of the plant used. The amount of the allowance for depreciation is the sum which should be set aside for the taxable year, in order that, at the end of the useful life of the plant in the business, the aggregate of the sums set aside will (with the salvage value) suffice to provide an amount equal to the original cost. The theory underlying this allowance for depreciation is that by using up the plant a gradual sale is made of it. The depreciation charged is the measure of the cost of the part which has been sold."

Let us, for the purpose of illustration, take a coal property, including one thousand acres, estimated to contain six million tons, the operation of which necessitates numerous openings and tipples and the construction of ten miles of railroad, the total cost of which is \$600,000.

Prudent business judgment would require that the operator add 10 cents, in addition to the cost of the coal and all operating expenses, to each ton of coal produced, in order to provide for the return of the capital invested during the life of the property.

Assuming that the life of the property is ten years; that the coal has been depleted 50 per cent at the end of five years; that prices have not changed; and that it becomes necessary to value the property, for the purpose of sale or other purposes, would it be reasonable to assume that the openings, tipples and railroads should be subject only to actual accrued physical depreciation? We think not.

It is believed that any prospective purchaser would take into consideration the fact that the coal had been depleted 50 per cent, and, therefore, the openings, tipples and railroad should be depreciated, by reason of obsolescence or functional depreciation, in the same proportion as the coal had been depleted, which, in this assumed case, would be 50 per cent.

We have a somewhat different situation in this case. The record discloses, as hereinbefore stated, that the Company contends that it will be able to purchase gas for some time after its gas supply is exhausted, probably six years, which would give P.U.R.1928B.

the property an estimated life of sixteen years. It would be necessary, however, to give consideration to the fact that prices have increased since the plant was constructed, thereby increasing the reproduction cost of the property, which must be considered, and the depreciation applied to the reproduction cost or present value of the property.

In the case of the United Fuel Gas Co. v. Public Service Commission, 14 F. (2d) 209, P.U.R.1927A, 707, 722, concerning this subject, the late Judge Rose, speaking for the Court, said:

"There cannot be room for much difference of opinion that a pipe line, which will lose all its value at the end of say eighteen years, because there will no longer be any use for it where it is and because it will cost more to dig it up than it will be worth when brought to the surface, is not in any reasonable sense of the term worth as much as would be one out of which forty years of useful service can be expected. From the standpoint under consideration, it would make little or no difference whether the pipes had been newly laid or had been in the ground for years. In either case, they would be efficient for eighteen years, and after that they would both be equally valueless."

If, as in the assumed case, the property, other than the coal, was found to be in 90 per cent physical condition, 50 per cent of the investment therein having been returned to the operator, the owner would be receiving a return on 40 per cent of the property, the cost of which had been returned on the assumption that it had been used up by reason of its expired life.

Table No. 1 shows the estimated reproduction cost of the Company's property to be \$7,242,088, from which should be deducted \$639,441, the estimated reproduction cost of 124 wells, which was not included in the capital account, but charged to operating expenses, leaving the estimated reproduction cost of the Company's property \$6,602,647. If we depreciate the property 50 per cent, based upon its age and expected life, we get a depreciated value of \$3,301,323, approximately 49 per cent, or \$1,617,648, should be allocated to West Virginia.
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Market Value

[26] The record discloses that the Company purchased the property now being considered about December, 1924, and that it sold the same about November, 1926. It is believed that the Commission is entitled to know the amounts for which the property was sold. The Company had the information. It failed to furnish it to the Commission although requested so to do. It is also believed that had the information been furnished, it would not have sustained the value claimed by the Company, for its property.

Concerning this subject, the following cases may be of interest.

In the case of *Standard Oil Co. v. Southern P. Co.* 268 U. S. 146, 69 L. ed. 890, 896, 45 Sup. Ct. Rep. 465, Mr. Justice Butler, delivering the opinion for the Court, said:

"But there is another matter infinitely more important than this,—known even to the most unlearned,—the constant change which takes place in the market. It is the market price which the Court looks to, and nothing else, as the value of the property. It is an old saying, 'The worth of a thing is the price it will bring.'"

In the case of *Chesapeake & P. Teleph. Co. v. Whitman*, 3 F. (2d) 938, P.U.R.1925D, 407, 411, the late Judge Rose, speaking for the Court, said:

"Usually the law assumes that, at any particular time, a thing is worth what it will then fetch in the open market. Some commodities are habitually dealt with on exchanges, which keep a record of what is sold on them and of the prices realized. As a rule, the law for its purposes will accept such quotations as accurately determining what the commodity was worth on any particular day, although doubtless it sometimes may be permissible to show the existence of peculiar conditions which would make the ordinary assumption untrue and unjust. Other articles are subjects of almost daily purchase and sale, but the transactions in them are matters of private bargaining, and the prices paid at the same time by different people may vary considerably. In such cases the trier of fact may not find it quite P.U.R.1928B.

so easy to determine what, at any particular time, may have been the precise actual worth of a unit of the commodity involved in the controversy, but the margin of possible uncertainty is usually relatively small. Then, again, the property, the value of which is to be ascertained, may have peculiarities of its own, as is usually the case with land.

"Court or jury may have not a little difficulty in determining from conflicting testimony what the real market value is; but the law says they must come as near as they can to valuing the land at the best price which its owner, if willing to sell, but not compelled to do so, could obtain for it from a buyer who wanted it, but who could get along very well without it. It is doubtless easier to state the rule than it is to apply it, by putting oneself in the position of such purely imaginary buyers and sellers; but on the whole, in practice, it has worked fairly well. In the nature of things, there can be seldom anything like a free market for a public utility. Except in the case of some comparatively small properties, possible purchasers are few, and probable ones perhaps nonexistent. This was true, even before the days of public regulation and limitation of rates."

There is nothing in the record to indicate that the Eastern Oil Company was compelled to sell, or that the Company could not get along very well without, the property involved in this proceeding; in fact, there appears to be no connection between this property and other property owned by the parent company, which is the Southern Gas & Power Company.

If the information regarding the sale price of the property had been furnished to the Commission, it would at least have had the benefit of knowing what value was placed upon the property by the officers, including the directors, of the Eastern Oil Company, at the time it was sold to the Company, which was about December, 1924, and also the value placed upon the property by the Company and the purchaser when sold in November, 1926.

We have not considered, so far, the 1926 additions to the Company's property. Mr. Williamson finds that the net additions, for the year 1926, amount to \$79,620, in which amount P.U.R.1928B.

is included \$12,694.71 paid to the Whetstone Utilities Management Corporation, for engineering.

Mr. Williamson, at page 12 of his supplemental report, itemizes the additions. After examining this report, it is believed that the charge for engineering is excessive, as the additions are simply minor replacements and material, supplies, and automobiles, requiring little or no engineering.

It may be that the engineering charge should be reduced \$10,000. However, we are adding the full amount set up for additions. Half of this amount, or \$39,810, should be apportioned to West Virginia, and added to the property values hereinbefore mentioned.

[27, 28] After considering all that has been said regarding the taking of the inventory, the proof in support thereof, the estimated reproduction cost based thereon, the investment or book cost, in so far as it can be determined and the age and estimated life of the property, we find that the value of the property, including leaseholds, apportioned to West Virginia, which is approximately 49 per cent of the total property, does not exceed \$1,900,000. To this amount should be added going value and working capital.

Working Capital

We find that \$100,000 is sufficient in this case for working capital, as material and supplies are included in the estimated reproduction cost of the property.

Going Value

The record shows that the Company's predecessors never solicited business; that its gas has been depleted at least 85 per cent; that the present contracts for gas do not cover periods longer than five years; that the industrial consumers, by reason of the increased price of gas, are not now using gas; and that after the year 1907, at which time the Company's plant was installed, the income was more than sufficient to pay operating expenses, provide for depreciation in all of its forms, and also provide an 8 per cent return on the value of the property, as shown in Table No. 2. It may be that the value of an efficient organiza-

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tion to conduct the business of the Company, has added to the value of its property. After considering all that has been said for the record concerning this subject, we find that \$300,000 should be added for going value.

Rate Base

It follows, therefore, that the fair value of the Company's property devoted to its public service business within this state, is determined to be \$2,100,000, as follows:

Physical property, etc.	\$1,900,000.00
Working capital	50,000.00
Going concern value	150,000.00
Total	<u>\$2,100,000.00</u>

Operating Expenses

The yearly average operating expenses of the Company and its predecessors, during the years 1922 to 1925, inclusive, is \$441,505. The amounts for rents and royalties, purchased gas and management fees are not included, for the reason that these amounts necessarily vary considerably from year to year. The operating expenses for the year 1926, not including the items mentioned, are \$493,164, or \$51,659 more than the average for the years 1922 to 1925, inclusive. It follows, of course, that there should have been some increased expense, by reason of the increase in the number of consumers. This, however, should not have exceeded \$5,000, and it may be that the increase in the salary of certain employees was justified. This amount is about \$10,000, making a total of \$15,000, leaving an increase in operating expense, for 1926, of \$36,659, as compared with the operating expenses for the years 1922 to 1925, inclusive.

[29] The Company has charged to operating expenses, for the year 1926, the sum of \$5,267.48, to be added to the reserve for "uncollectible account." It also set up, in the year 1925, the sum of \$4,970.33, for this same purpose. The report of Mr. Williamson shows that, during the years 1925 and 1926, \$1.02 was charged to this account. This practice is unusual and should not be continued. It may be that the company has some uncollectible accounts. However, in view of the fact that each

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consumer is required to make a deposit before receiving gas, the loss should be negligible, as evidenced by the fact that only \$1.02 was charged to this reserve in two years. We are of the opinion that the amount set up for this item, or \$5,267.48, should be deducted.

[30] The Company has charged to operating expenses the sum of \$566, for donations. The Commission is of the opinion that donations should be borne by the Company and not by its consumers, therefore, this amount is not allowed as an operating expense.

An examination of the Company's agreement with the Whetstone Utilities Corporation discloses that the Company agrees to pay an engineering fee of 15 per cent to the Whetstone Utilities Corporation on all additions made to its property. The additions to the Company's property in 1926 include the following items: Distribution Line Equipment, \$25,160; Meters, \$13,681; Garage Equipment, \$10,272; making a total of \$49,113.

The total net additions, as shown by Mr. Williamson's report, were \$79,620, including \$12,694 for engineering, which sum was paid to the Whetstone Utilities Corporation, and which is an addition to the \$45,866.24 paid to this same corporation as a management fee. The agreement to which reference has just been made, contains the following provision:

"No extra charge shall be made by the management corporation for its services in connection with any audits supervised by managers of its staff. The gas company shall, however, when requested by the management corporation, have its books independently audited by certified public accountants, and the fees of such accountants shall be paid by the gas company." . . . "The management corporation shall be entitled to extra compensation at a reasonable rate for assistance rendered in connection with any litigation (including hearings before the Public Service Commission or any other regulatory body) or any other matter involving extraordinary legal or accounting service." . . . "The gas company will also reimburse the management corporation for all traveling, hotel and similar expenses which may be incurred from time to time by members of its organization."

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tion in connection with work performed for the benefit of the gas company."

[31] It is also provided in said agreement that the Company will pay to the Whetstone Utilities Corporation an amount equal to 3 per cent of its gross revenue from all sources. It will be observed that the management fee of \$30,000, set up in the operating expenses by the predecessor companies, was not allowed by the Commission in former cases involving this property. In view of this fact, and the further fact that general office salaries have been increased as well as the salaries of other employees, it is believed that this amount, which is \$45,866.24, should be deducted from operating expenses.

If the expense of managing a utility is to be pyramided in this fashion, then the benefit to be derived from regulation is impaired, if not entirely destroyed.

We are of the opinion, therefore, that the Company's agreement with the Whetstone Utilities Corporation, to which reference has just been made, is unjust and unfair to the Company's consumers, and that any expense incurred by reason of said agreement should not be allowed.

[32] The Company has set up a charge of over \$100,000, for rate case expense, \$14,654.57 of which has been added to expense, for the year 1926. It is believed that a charge of \$100,000, for this work is excessive, and cannot be justified, and never would have been expended had it not been for the fact that it could be passed on to the public; besides, it may be that certain of this expense was incurred for reasons other than presenting this case to the Commission.

[33] We understand that Commissions are not managers of utilities. However, it is believed that it is within the province of the Commission to scrutinize carefully extravagant expenditures of this nature. It has been pointed out that the Company refused to use the inventory made of this property, for the predecessor companies, by Mr. Wyer, and that the Company's division superintendents could have testified to the correctness of the inventory furnished the Company's engineers and the condition of the property it represented, which would have been much better evidence than that of Mr. Smith, who testified almost

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entirely from information. Had this procedure been followed, the engineering costs incurred in presenting this case to the Commission should have been greatly reduced.

Mr. Smith testified that it required 2300 man days to make the inventory, and appraisal of, and check in spots, the Company's property. There is included in this property about 400 miles of pipe lines. If we allow 300 days for checking property not connected with the pipe lines and such other work as may be necessary to make an appraisal of the property, we have 2000 days left to devote to the pipe lines, which would allow one man five days to inventory, check, examine, and appraise each mile of pipe.

We are of the opinion that \$50,000 is a reasonable sum to allow for this item, and that this amount should be amortized over a period of four years, necessitating a charge to operating expenses of \$12,500, for the year 1926, which is \$2,154 less than the amount included for this item.

In order to determine the amount that should be allowed for operating expense, which is shown to be \$798,606.56, it is necessary to deduct the following amounts:

Uncollectible accounts	\$5,267.46
Donations	566.00
Management fee	45,866.24
Excess rate case expense	2,154.57
Total	\$53,854.27

leaving the adjusted operating expense, for the year 1926, \$744,752.29.

Gross Revenue

[34] The gross revenue of the Company, in the year 1926, as shown by Mr. Williamson's report, is \$1,106,091.42. It is contended by the Company that the revenue from the sale of gasoline, which amounted to \$34,080.43, should not be included. The record shows that the cost of rerubbing the Company's line was \$289,000; that the rerubbing was made necessary because of the fact that the gasoline was extracted from the gas; that before the line was rerubbed, millions of feet of gas were lost by reason of the shrinkage of the rubber gaskets; and that P.U.R.1928B.

gas is still escaping by reason of the fact that the gasoline has been extracted from the gas; besides, the removal of the gasoline reduces the heat units in the gas. We are of the opinion that the income from gasoline should be included in the gross revenue of the Company.

We are also of the opinion that the Company should collect from the Appliance Company \$3,200, for rent and services rendered the Appliance Company by employees of the Company.

The following set-up shows the revenue and operating expenses, as adjusted:

Revenue, 1926	\$1,106,091.42	
Charges to Appliance Company	3,200.00	
Total		\$1,109,291.42
Operating expenses, 1926	798,606.56	
Uncollectible accounts	\$5,267.46	
Donations	566.00	
Management fee	45,866.24	
Excess rate case expense	2,154.57	
Total	\$53,854.27	
Adjusted		\$744,752.29
Net income		\$364,539.13

The above adjusted revenues and expenses are apportioned between the states as follows:

	West Virginia		Maryland		Total
	%	Amount	%	Amount	
Operating income ...	51.25	\$568,560.40	48.75	\$540,731.02	\$1,109,291.42
Operating expenses ...	51.52	383,745.75	48.48	361,006.54	744,752.29
Net operating expenses	50.70	\$184,814.65	49.30	\$179,724.48	\$364,539.13

Depreciation, Depletion and Amortization

It has been urged by the Company that its predecessors failed to earn $5\frac{1}{2}$ per cent for depreciation and 8 per cent return upon the value of the property, over its expired life, by \$1,269,679. We do not agree that $5\frac{1}{2}$ per cent should have been set up for depreciation. Perhaps 5 per cent was a reasonable amount, in view of the fact that it was contended that the property had a much shorter life than it now appears to have, nor do we agree that, had 5 per cent been set up for depreciation, the predecessor companies would not have earned 8 per cent on the fair value P.U.R.1928B.

of their property. Our views regarding this matter are fully set out in Table 2, which is attached hereto and made a part hereof.

[35] We hold that it is the book cost, or original investment, that must be amortized through the annual allowance for depreciation and depletion, and not the value of the property. We hold also that it was the duty of the predecessor companies to set up an amount each year sufficient to retire the investment in the property at the end of its useful life.

The subject was discussed by our supreme court of appeals in *Clarksburg Light & Heat Co. v. Public Service Commission*, 84 W. Va. 638, P.U.R.1920A, 639, 651, 100 S. E. 551. Judge Ritz, among other things, said:

"In other words, in order to arrive at a just conclusion as to what is a proper allowance to be made for amortizing the investment we must consider that this process has been going on during the whole life of the plant. It will not do to say that this company could by continued active operations for the first half of its life, exhaust more than one-half of its gas supply, and declare the whole of it in dividends as profits on its investment, and then begin the amortization of the investment after its property had been thus depleted."

Table No. 2 shows the financial history of the Company and its predecessors from the year 1899 to and including 1926. Column 1 shows the net annual income after returning to operating expenses the drilling cost of wells and the labor cost of the Braxton line, which was amortized, as shown on the bottom of the sheet. To have deducted the cost of the Braxton line from operating expenses would have increased the net income and also the charge to depreciation reserve, making little difference in the final result.

Column 2 is the book investment as adjusted by Mr. Williamson; in other words, it is the result of taking the drilling cost of wells and the labor cost of the Braxton line out of operating expenses and adding the cost to the capital account.

Column 5 is the investment as shown by the books of the Company before adjustments were made by Mr. Williamson and Mr. Jirgal. As hereinbefore stated, these adjustments were made in P.U.R.1928B.

order that the investment might conform to the Classification of Accounts prescribed by the Commission.

Column 6 shows the annual depreciation at 2.70 per cent, which is one-half of one per cent less than was applied to this same property by Mr. Wyer in the year 1917. It will be observed that this rate gives the property a life of approximately thirty-eight years. It may be that the rate should have been higher. If so, the result would have been a greater reduction in the property, by reason of depreciation, and also a reduction in Column 12, representing 8 per cent return on the depreciated value of the property.

Columns 7, 8, 9, and 11 speak for themselves.

Column 10 represents the depreciated investment in the property, to which 10 per cent has been added for going concern value and working capital down to and including the year 1916. After the year 1916, the figures in Column 10 represent the value of the property as fixed by the Commission.

The summary shows that after deducting 8 per cent for return and 5 per cent for depreciation, with the exception of four years, as indicated, the excess earnings amounted to \$1,049,620.79; that the amount set up for depreciation, depletion, and amortization, less retirements, is \$2,495,082.06, leaving \$1,636,619.50 to be amortized over the remaining life of the property, which has been fixed at sixteen years. We have found that 49 per cent of the property should be apportioned to West Virginia, therefore, 49 per cent of \$1,636,619.50, or \$802,943.65, should be amortized from revenue received from West Virginia consumers.

The property retirements up to and including the year 1926 amount to \$481,008.33. The record shows that \$289,000 of this amount was the cost of rerubbing the main transmission line, which, we are assured, will not occur again. Deducting this amount from the total retirements, we get \$192,008.33. 49 per cent of this amount, or \$94,084.08, should be apportioned to West Virginia.

It is believed that \$75,000 is a sufficient sum to allow for depreciation, depletion, and amortization. Multiplying that amount by sixteen, representing, in years, the estimated life of

the property, we get \$1,200,000. If we deduct from that amount \$802,943, the book cost of the property apportioned to West Virginia remaining to be amortized, we have \$397,057 in excess of the amount necessary to amortize the unamortized investment in the property allocated to West Virginia.

It will be noted that no reference has been made to the salvage value of the Company's property when its usefulness, for the purpose it is now being used, is ended, and that the ordinary retirements throughout the expired life of the property apportioned to West Virginia amount to \$94,084.08.

The rate of depreciation allowed in former cases involving this property was evidently intended to cover depreciation in all its forms. The name by which it is called is unimportant. The purpose is to set up in the depreciation reserve an amount sufficient to retire the property at the end of its useful life; and where, as in this case, the earnings are ample, it must be assumed that the utility has set up the necessary amount.

Concerning this subject, the following appears in brief of counsel for the Company:

"Take the case of the 12-inch main transmission line from Forman Station to Cumberland. While today it may show depreciation based on observation of 6 per cent of the reproduction cost new, nevertheless, we know it will wear out some day and may go out of service in large part in a relatively short time when its useful life begins to terminate. Obviously, provision for this contingency, which is bound to occur, must be made in advance and this provision should not be controlled by the present per cent condition of the pipe in the ground. Then, too, there are many other items of property in the plant which the evidence shows have to be retired from service very much sooner than the pipe in the ground and which, thereafter, require more frequent renewals and replacements. The characteristics of these items, such as compressor station equipment, meters, and miscellaneous equipment, require the allowance of a much larger annual amount for depreciation in order to build up and maintain a depreciation reserve sufficient to provide for their frequent retirement and replacement."

The foregoing statement is hardly consistent with the almost P.U.R.1928B.

negligible annual depreciation contended for by the Company when estimating the reproduction cost of the property. The fact remains, however, that, had the rate allowed by the Commission in former cases been applied throughout the expired life of the property, the amount in the depreciation reserve, supplemented by \$75,000 annually during the remaining life of the property, would be more than sufficient to retire all of the property involved within its estimated useful life.

Counsel for the Company, in support of its contention for an allowance of $5\frac{1}{2}$ per cent to cover depreciation, depletion, and amortization, in their brief cite numerous cases to show the per cent usually allowed by courts and Commissions in natural gas cases. The variance in the amounts allowed show conclusively that the percentage must be determined by the amount to be set up, based upon the life of the property. A high rate of depreciation, if properly allowed, necessarily means that the property has a correspondingly short life, and that the property will be used up by the public either actually or theoretically within its estimated life, and where, as in this case, the supply of the commodity sold has been reduced 80 per cent, it must of course, to some extent, determine the value of the property as well as the amount to be set up for depreciation, depletion, and amortization.

It is reasonable to assume that the property will not continue to have, for a period of sixteen years, the value it has now. It is also reasonable to assume that it will be necessary to make some replacements, the cost of which will have to be amortized.

It is believed, from what has been said concerning this subject, that \$75,000 is a reasonable amount to set up at this time for depreciation, depletion, and amortization.

Return

It has been pointed out in this report that, on the basis of the rates the Company is seeking to cancel by the rates now under investigation, the Company, after deducting unusual operating expenses, received a net operating revenue, for the year 1926, of \$184,814.65. If, from that amount, \$75,000 is deducted as a charge for depreciation, depletion, and amortization, there re-
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mains \$109,814.65, as compensation for the use of the private property owned by the Company in this state. That sum, based upon the value of the Company's property, as determined herein, is a little more than 5 per cent.

The United States Supreme Court, in the case of Bluefield Water Works & Improv. Co. v. Public Service Commission, 262 U. S. 679, 67 L. ed. 1176, P.U.R.1923D, 11, 43 Sup. Ct. Rep. 675, and in other cases, has held this rate insufficient; and the United States District Court, Southern District of West Virginia, three judges sitting, held, on May 2, 1927, in a proceeding involving the property in the Bluefield Water Works & Improvement Company case, that the return of $7\frac{1}{2}$ per cent allowed by this Commission was insufficient.

The Commission was, therefore, justified in its order of May 27, 1927, in determining that the rates then in effect were not legally sufficient to pay operating expenses, including taxes, provide for depreciation and a reasonable return upon the value of the Company's property. The rates proposed by the Company and under investigation in this proceeding would probably earn a net return of more than 15 per cent, and the Commission was, therefore, likewise justified in its order of May 27, 1927, when it held the proposed rates to be unjust and unreasonable.

It has been pointed out that the ordinary operating expenses, for the year 1926, were \$51,000 more than the average operating expenses for the years 1922 to 1925, inclusive, and that the line loss, or gas unaccounted for, is unusually large; and if the loss is reduced to a reasonable amount, the saving to the Company would amount to approximately \$40,000 annually. It may be, therefore, that the operating expenses should be reduced, but, since it is believed that there will be some increase in the operating expenses, by reason of the increase in the number of consumers, the adjustment in salaries, payment of income tax, and the fact that the Company will be required to purchase more gas as its gas production is reduced, the operating expenses will not be disturbed.

When hearings were being had before the Commission involving the property in this proceeding, the Company's predecessors contended that the remaining life of the property did not P.U.R.1928B.

exceed ten years. Accepting this contention, the Commission, as hereinbefore stated, fixed the value of the property in both states at \$3,000,000.

It now appears that the remaining life of the property is sixteen years. There cannot be much difference of opinion that a natural gas property with a life of sixteen years would have a greater value than a like property with an estimated life of ten years.

We have found the estimated reproduction cost of the property apportioned to West Virginia, based upon the inventory prepared by Sanderson and Porter, after deducting accrued depreciation, to be \$2,321,269. If we deduct from this amount:

Wells charged to operating expenses	\$174,655.00
Parallel line not useful	132,498.00
Total	<u>\$317,153.00</u>

we get \$2,033,116 as the depreciated value of the Company's property apportioned to West Virginia, not considering the excess capacity of the main transmission line and compressor station equipment.

We have found also that the investment in the property amounts to \$4,131,701.56, in which amount there is included much property that is not now in service, and that 48.32 per cent of this amount, or \$1,996,438, should be apportioned to West Virginia. After considering the fact that the Company's recoverable gas has been depleted 85 per cent and that the main transmission line and much of the other property has been in use for over twenty years, and that its remaining life is estimated to be sixteen years, it is difficult to understand how it can be seriously contended that the property apportioned to West Virginia, at this time, although prices have increased, has a value in excess of its original cost.

It is true, as stated in the brief of counsel for the Company, that the writer was present at the hearing held by the Maryland Commission, involving this same property. It is also true that the record before this Commission is entirely different from that upon which the case was presented to the Maryland Commission. In fact, they are so entirely different, by reason of the P.U.R.1928B.

evidence introduced by the protestants, that comparison cannot be made.

It has been stated that the Commission was of the opinion that the net income received by the Company during the year 1926 did not justify the granting of an emergency increase of 20 cents per thousand cubic feet, for which application was made on January 5, 1927. The Commission did, however, take into consideration the failure of the Company to earn 8 per cent return upon the fair value of its property, from January 5, 1927, to June 1, 1927, when it entered its temporary order authorizing the Company to increase its rates in each town 15 cents per thousand cubic feet of gas delivered each month, over the summer rates; and 7 cents per thousand cubic feet of gas over the maximum winter rates, said increase to remain in effect pending final judgment of the Commission in this case, during which time the amount the Company had failed to earn would be realized.

From all that has been said concerning the value of the property and the amount to be allowed for depreciation, depletion, and amortization, we are of the opinion, and find, that the value of the Company's used and useful property apportioned to West Virginia, including \$150,000 for going value and \$50,000 for working capital, does not exceed \$2,100,000; and that \$75,000 is a sufficient sum to set up annually for depreciation, depletion, and amortization.

Rate of Return

[36] The state does not guarantee to any public service corporation that its business will be a profitable venture. The state requires, and the public is entitled to have, continuous, adequate, and reliable public service from those who offer to serve it with necessary public service commodities,—such as fuel, power, water, transportation, and communication. The Commission has very wide powers, circumscribed only by the constitutional provision that private property cannot be taken for public use without just compensation therefor. The mandate of the courts and the judgment of Commissions generally dictate a return of 8 per cent for natural gas utilities. The Company is entitled to P.U.R.1928B.

rates that will enable it to undertake to earn that rate of return. It is the duty of the Commission to prescribe such rates.

Schedule of Rates

[37] Some years ago, the Company's predecessors, and their consumers as well, ask that a "step-up" rate be prescribed in order to conserve the gas supply and discourage the larger use of the fuel. That plan has not been satisfactory, and the schedules under consideration in this case are a departure from that form of rate. It is apparent, from the record herein, that it is not possible for the Company to conserve the gas underlying the property controlled by it, and that its failure to purchase more gas will not prolong the life of the territory from which its purchased gas is produced. It appears, therefore, that the future success of the gas business in the territory served by the Company depends upon the development of a larger market for natural gas.

From what has just been said, it would appear that a "step-down" rate should be made in order to provide a greater volume of business. The following schedule of rates is designed for that purpose, and the rates are estimated to earn a net annual revenue of approximately \$245,000, which sum, after paying general operating expenses, including taxes, is sufficient to pay an 8 per cent return upon the value of the property as determined herein, and provide \$75,000 for depreciation, depletion, and amortization. These rates are, therefore, held just and reasonable and are as follows:

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Rates per thousand cubic feet per month.

Towns.	First 2	Next 2	All over 4
	M cu. ft.	M cu. ft.	M cu. ft.
Jane Lew	\$.49	\$.44	\$.39
Butcherville .....	.49	.44	.39
Deanville .....	.49	.44	.39
Lightburn .....	.49	.44	.39
Buckhannon .....	.55	.50	.45
Hodgesville .....	.55	.50	.45
Berlin .....	.55	.50	.45
Philippi .....	.59	.54	.49
Volga .....	.59	.54	.49
Hall .....	.59	.54	.49
Belington .....	.59	.54	.49
Junior .....	.59	.54	.49
Dartmoor .....	.59	.54	.49
Elkins .....	.61	.56	.51
Beverly .....	.61	.56	.51
Mill Creek .....	.61	.56	.51
Huttonsville .....	.61	.56	.51
Parsons .....	.61	.56	.51
Hambleton .....	.61	.56	.51
Hendricks .....	.61	.56	.51
Montrose .....	.61	.56	.51
Moore .....	.61	.56	.51
Thomas .....	.63	.58	.53
Davis .....	.63	.58	.53
William .....	.63	.58	.53
Bayard .....	.63	.58	.53
Dobbin .....	.63	.58	.53
Gormaniana .....	.63	.58	.53
Henry .....	.63	.58	.53
Kingwood .....	.66	.61	.56
Rowlesburg .....	.66	.61	.56
Manheim .....	.66	.61	.56
Tunnelton .....	.66	.61	.56
Albright .....	.66	.61	.56
St. George .....	.66	.61	.56
Black Fork Dist. ....	.66	.61	.56
Elk Garden .....	.66	.61	.56
Blaine .....	.66	.61	.56
Terra Alta .....	.67	.62	.57
Corinth .....	.67	.62	.57
Piedmont .....	.67	.62	.57
Beryle .....	.67	.62	.57
Keyser .....	.67	.62	.57
Ridgeley .....	.72	.67	.62

All rates subject to an additional charge of 2 cents per thousand cubic feet if bill rendered the first of the month is not paid on or before the 10th of the month.

Table No. 3, showing the apportionment of the income and expenses between the states, is hereto attached and made a part hereof.

An order may be entered in accordance with the foregoing report.

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Chairman Coffman concurs in the foregoing conclusions; Commissioner Divine dissents.

Coffman, Chairman, concurring: I concur in the conclusion of Mr. Commissioner Nethken that, under the proof in this case, \$7,178,334 is a fair estimate of the reproduction cost, new, of all the tangible property of the Cumberland & Allegheny Gas Company, including materials in place, labor, superintendence, engineering, interest during construction, and all other expenditures necessary to construct its wells, lines, and works.

The contention of the Company that the reproduction cost of its property is \$9,496,483, and the fair value of its natural gas leaseholds approximately \$600,000, a total of \$10,096,483, to which it would have us add the further sums of \$200,000 for working capital and \$1,209,614 for going value (a grand total of \$11,506,097), is not supported by the evidence.

Mr. Nethken estimates accrued depreciation at \$2,421,760, a weighted percentage of 33.7 per cent. The company contends for a weighted depreciation of about 15 per cent on its estimate of reproduction new. Applying 15 per cent for accrued depreciation on the estimate of \$7,178,334 results in the sum of \$1,076,750 for this item, and \$6,101,584 for the cost of reproduction less accrued depreciation; while the application of Mr. Nethken's estimate of \$2,421,760 results in an estimate by him of \$4,756,574 for the cost of reproduction less depreciation. I am of the opinion this figure is more nearly the fair value of the tangible property, as of the date of the inventory, December 31, 1925, the sum of \$2,421,760 representing not only accrued depreciation but to a large extent also the difference between reproduction cost, new, and present fair value.

The finding of Mr. Nethken of the valuation of leaseholds and going value, and of an amount to be assigned as working capital, is also concurred in.

The fair value of all the company's property, including additions made during 1926, may be set down as follows:

Physical property, December 31, 1925	\$4,756,574
Additions to December 31, 1926	79,620
Natural gas leaseholds	63,754
Going value	300,000
Working capital	100,000

Total	\$5,299,948
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Allocating 48.32 per cent of the property to West Virginia, results in the sum of \$2,560,900. From this amount there should be deducted the value placed upon the pipe line not used for furnishing gas within this state and that part of the value placed upon gas well construction which, by the policy pursued in this state, has been expressly pleaded by the utility as an operating charge and included in the sums paid by the consumers. The supreme court of appeals in *Elkins v. Public Service Commission*, 102 W. Va. 450, P.U.R.1927B, 270, 135 S. E. 397, decided October 26, 1926, points to the contention of the rate payers in that case that this company's plant is of capacity to handle much more gas than it is now handling, and refers to former holdings of this Commission to that effect, with apparent approval, as follows:

"The opinion of the Commission, determining the valuation of May 25, 1921, stated that the investment was greater than the total gas rates would warrant under ordinary circumstances, that the plant was of ample capacity to handle more than five times the volume of the gas sold in 1920, and that the logical solution of the difficulty was to increase the volume of business or decrease the plant investment."

I, therefore, concur in the rate base determined in the foregoing report by Commissioner Nethken as the fair value of the company's property now being utilized in its public service business in West Virginia, and I approve the schedule of rates proposed by him.

Divine, Commissioner, dissenting: As indicated by the following memorandum, I am of the opinion the Cumberland & Allegheny Gas Company is entitled to a materially higher rate than allowed by the Commission.

A brief review of the various cases which have been before the Commission upon applications filed by the West Virginia Central Gas Company, West Virginia & Maryland Gas Company and West Virginia & Northern Gas Company—the predecessors of the applicant company—is of interest.

In *Re West Virginia Central Gas Co.* Case No. 557, 5 Ann. P.U.R.1928B,

Rep. W. Va. P. S. C. 230, 1 P. S. C. W. Va. Decisions, 455, P.U.R.1918C, 453, decided January 22, 1918.

In this case Mr. Samuel Wyer, an engineer testifying in behalf of the applicant, fixed the reproduction value of the property as of December 1, 1915, at \$5,693,766.34; the depreciation 28 per cent; and the reproduction cost new less depreciation \$4,099,511. For going concern value Mr. Wyer allowed 10 per cent of the reproduction cost new, or \$569,376.63, or a total value of \$4,668,888. Mr. Wyer does not seem to have included anything for working capital. In connection with this valuation, it should be noted that his cost prices of property, other than gas leases, were based on the average price of material and labor during the ten years prior to September 1, 1915. The Commission found in this case that the book cost of the property, other than gas leases, was \$3,576,689, which did not include \$418,000 (labor cost of drilling wells), which, under the rules now in effect, would be included in the book cost. However, the Commission took \$3,576,689 as the book cost of the property. It then depreciated this amount 28 per cent and fixed upon \$2,575,216 as the fair value of the property, exclusive of the value of the gas acreage, working capital, and going concern value. It fixed the value of the gas acreage of 10,821 acres at \$50 per acre, or \$541,050. It allowed 10 per cent, or \$311,626, for going concern value, and \$70,000 for working capital. The total value of the property as fixed by the Commission was \$3,497,893.

In *Re West Virginia Central Gas Co.*—Case No. 929, decided March 31, 1920, 7-8 Ann. Rep. W. Va. P. S. C. 188, 1 P. S. C. W. Va. Decisions, 686.

In this case the Commission reduced the value of the property from \$3,497,893 to \$3,000,000, explaining it did so as it had adopted the rule that only the investment cost of gas leaseholds should be allowed in the valuation and that the allowance by the Commission in Case No. 557 exceeded this.

In *Re West Virginia Central Gas Co.* Case No. 1158, decided June 28, 1921, 7-8 Ann. Rep. W. Va. P. S. C. 501, 1 P. S. C. W. Va. Decisions, 862.

In this case a value of \$3,000,000 was allowed. The Braxton P.U.R.1928B.

County investment was not included in this valuation as an amount was allowed in operating expense to amortize this field, which was supposed to have a very short life.

In *Re West Virginia Central Gas Co.* Case No. 1461, decided June 2, 1924, Bulletin No. 88, 11 Ann. Rep. W. Va. P. S. C. 139, P.U.R.1924E, 24.

In this case the applicant contended that present day prices should be applied to the Wyer inventory used in Case No. 557, *supra* and that by doing so the undepreciated value would be approximately \$9,000,000. Depreciating that amount 50 per cent, the value of the property would be \$4,500,000. The evidence in the case showed that between January 1, 1917, and June 30, 1923, the company had put \$227,112.18 into the property and that the total investment as per the books was \$3,791,258.20, which amount did not include approximately \$700,000, labor cost in connection with field lines and well drilling. The Commission allowed a total value of \$3,000,000, which included \$300,000 as going concern value and \$70,000 as working capital.

From a review of this case it will be noted that the Commission's valuation is arrived at by taking an amount approximately \$700,000 less than the book cost—most of which has been subject to a deduction of 28 per cent for depreciation—and then reducing \$1,463,530.07 on account of the amount that had accrued for depletion and depreciation, which we now know, as a matter of law, was clearly an erroneous deduction. And it might be well to note here that the evidence in the case under consideration has developed the fact that the company had never, as a matter of fact, accrued \$1,463,530.07 for depletion and depreciation.

If we add \$700,000 (the book cost not considered) to the Commission's value of \$3,000,000, and \$1,463,530.07 (the amount deducted for depletion and depreciation), the Commission's valuation on the basis used would have been \$5,163,530.07, and if we add \$216,353 for additional going value on account of increased valuation, the total value would be \$5,379,706.

From a review of these cases it is evident the applicant has always been allowed a value upon its property materially less than the depreciated book cost. This fact is very evident when P.U.R.1928B.

we note that the accountants in the case under consideration found the book cost of the property on December 31, 1914, to be \$3,851,363.31.

To enable the Commission to arrive at the fair value of the property it has been furnished by the company with the book cost, or the investment in the property as of December 31, 1925; the cost of building the property by applying index figures to the book cost; and the reproduction cost new less depreciation of property other than gas holdings as well as the present fair value of the gas holdings of the company. The Commission has also been furnished with the book cost, as found by its statistician, and much information by protestants' witnesses.

Book Cost

Mr. Jirgal, an accountant who testified in behalf of the applicant, fixed the book cost or investment in the property as of December 31, 1925, at \$4,714,928. Mr. Williamson, statistician for the Commission, fixes the book cost or investment as of December 31, 1925, at \$4,714,150.06. Mr. Williamson fixes the book cost or investment as of June 30, 1926, at \$4,758,211.41. Of course, no allowance is made by either accountant for working capital or going concern value.

Mr. Jirgal testified at length as to the method he used in arriving at the book cost of this property and from his testimony it is evident he used great care in so doing. It also appears that for the purpose of being sure to eliminate from the book cost, property taken out of service, he checked the property as shown on the books with the inventory prepared by Mr. Smith.

Mr. Jirgal and Mr. Williamson are only a few hundred dollars apart as to the book cost or investment, and as both these gentlemen are highly skilled in public utility accounting, I think their findings as to the book cost should be accepted. There certainly is nothing in the record that would persuade one to the contrary. (See Jirgal Exhibit No. 1, and Williamson's report.)

Application of Index Figures to Book Cost

Mr. Jirgal has found the cost of reproducing the property as of December 31, 1925, by applying index figures and arrives at the following amounts. (Jirgal Exhibit No. 3; R. page 437.)
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Applying Jirgal's index figures \$8,631,856.00
Applying Engineering News Record index figures 8,788,580.00

Mr. Jirgal also gives us the cost of building the plant as of December 31, 1925, by applying index figures to the book cost of the property up to January 1, 1915, and adding thereto the actual additions from that date to December 31, 1925, and arrives at the amount of \$8,370,944. (Jirgal Exhibit No. 6; R. page 840.)

Working Capital

Mr. Jirgal fixes the amount of working capital at \$144,399, (Jirgal Exhibit No. 1; R. page 361) but this amount does not include material and supplies.

Mr. Flynn, a witness who testified in behalf of the applicant, fixes the amount of working capital required at \$203,162.86. (Flynn Exhibit No. 1; R. pages 240, 244.)

Mr. Brady, who testified in behalf of the protestant, stated that in his opinion \$50,000 was an ample allowance for working capital. It seems to me that a very superficial consideration of this case would indicate that \$50,000 is clearly an inadequate allowance for working capital. It also seems to me that \$203,162.86—the amount fixed by Mr. Flynn for working capital—is reasonable. Mr. Flynn explained fully his reasons for fixing this amount.

Going Concern Value

Mr. Lawrence, a witness who testified in behalf of the applicant, fixes the going concern value, or the cost of reproducing the business, at \$1,209,614 (Lawrence Exhibit No. 1; R. pages 285, 298.) Mr. Jirgal fixes the cost of reproducing the business at \$1,269,679. (Jirgal Exhibit No. 1, page 11, table 5; R. page 361.) Mr. Brady testified there was no going concern value.

From the evidence in this case there is no question but that there is a going concern value. There is no amount estimated for going concern value other than that given by Mr. Lawrence and Mr. Jirgal.

The method used by these witnesses is, to a large extent, ap-P.U.R.1928B.

proved in other cases. *Brooklyn Borough Gas Co. v. Prendergast*, — F. (2d) —, P.U.R.1927A, 200; *Fort Smith v. Southwestern Bell Teleph. Co.* 294 Fed. 102, P.U.R.1924E, 662; 270 U. S. 627, 70 L. ed. 768, 46 Sup. Ct. Rep. 206.

I do not think the cost of establishing the business is the going concern value of a plant. It is one element to consider, but there are other elements as important. The record in this case gives us a pretty good picture of this plant—its earnings, its future life, and what its earnings would be under a reasonable rate. After consideration of these matters and others, I think this utility has a going concern value and it is a substantial one. For the purpose of this analysis, it is necessary that the amount of going concern value be fixed. I have disregarded the applicant's evidence and have adopted 8 per cent as the fair value of the property, including working capital, which gives \$563,710 for going concern value.

Value of Gas Holdings

The value of the gas holdings, as testified to by the three witnesses below named, is as follows:

Smith	\$509,885.00
Krebs	650,000.00
Horner	592,052.00

In regard to his valuation, Mr. Smith states:

"The value 'leaseholds' is herein taken as the value of the recoverable gas in the ground determined by deducting from its value at the surface of the ground the cost of bringing the gas to the surface."

Determining the value in this way involved three things:

1. The volume of gas in the ground.
2. The value of the gas at the surface.
3. The cost of bringing the gas to the surface.

Mr. Smith, by a well-recognized method, fully explained, determined the amount of gas in the ground that would be produced until the rock pressure should reach 25 pounds, and any gas that could be produced at this or lower rock pressure was not considered. Mr. Smith found the gas in the ground to be 11, P.U.R.1928B.

436,000,000 cubic feet. He then determined the value of the gas at the surface of the ground. He did this by taking the average price paid by the company for gas in Lewis and Harrison counties—which was 23.4 cents per M. cubic feet—and the average price paid for gas in the Braxton field. There being, according to his estimate, 6,980,000,000 cubic feet of gas in the Lewis and Harrison county fields, he found the value of this gas at the surface, at 23.4 cents per M. cubic feet, to be \$1,633,320; and there being 4,456,000,000 cubic feet of gas in the Braxton field, he found this gas to be worth, at the surface, 20 cents per M. cubic feet, or \$891,200, or a total value of the gas in both fields of \$2,524,520 at the surface.

In order to determine the value of the gas, Mr. Smith then deducted the total cost of bringing it to the surface and, by this method, found the gas in the ground to be worth .0448 cents per M. cubic feet, at which rate the entire volume of gas was worth \$509,885. (See Smith Exhibit No. 11; R. page 262 et seq.)

Mr. Krebs testified that the volume of gas which could be produced from the company's field was 14,146,000,000 cubic feet and that its value was \$650,000. Mr. Krebs used practically the same method of arriving at the value of the gas in the ground as Mr. Smith. However, he contends a great deal of gas can be brought to the surface when the rock pressure reaches 25 pounds or under and that the value of the gas at the surface in Lewis and Harrison county fields was 25 cents per M cubic feet and not 23.4 cents as fixed by Mr. Smith.

The supreme court of appeals of this state, as well as a number of other courts, has criticized any method of arriving at the value of the gas by an estimate of the gas still remaining in the ground, as it was too uncertain, but other courts have recognized the feasibility of this method. (*Erie v. Public Service Commission*, 278 Pa. 512, P.U.R.1924D, 89, 123 Atl. 471; *United Fuel Gas Co. v. Public Service Commission*, 14 F. (2d) 209, P.U.R. 1927A, 707).

Mr. Boyd E. Horner, a man of broad experience in the oil and gas business, testified as to the value of the gas holdings or leaseholds, and fixed the value at \$592,052. Mr. Horner, after qualifying himself as a competent witness, stated that the value P.U.R.1928B.

of the leaseholds and wells was \$1,225,302; that in Lewis county there were 1,609 acres of undeveloped leases which he valued at \$7 per acre, making a total of \$11,263; that in Braxton county there were 660 acres of undeveloped acreage, which, at \$7 per acre, would give it a value of \$4,620; that in Upshur county there were 787 acres, and in Barbour county 1,482 acres of undeveloped acreage worth \$7 per acre, or \$12,919; that the total value of the undeveloped acreage was \$28,802 and that it has a market value of that amount. I understand practically all this acreage has been surrendered; therefore, the value should be deducted and I have done so.

As to the developed acreage, Mr. Horner states:

"Under the developed acres, I have in Lewis county 5,178 acres at \$60 an acre—\$310,680; in Harrison county 1,787 acres at \$60 an acre—\$107,220; in Braxton county 2,825 acres at \$50 per acre—\$141,250; in Gilmer county 82 acres at \$50 per acre—\$4,100; making a total of developed leases of 9,872 acres, amounting to \$563,250."

Mr. Horner's testimony is more in line with that which our supreme court of appeals has indicated as the proper kind of evidence to prove the value of the leaseholds, and I think his valuation should be accepted.

The protestants introduced no evidence as to the value of the leaseholds and practically all we have on that subject is that given by the applicant's witnesses.

As bearing on the value of leaseholds, I think attention should be called to the evidence introduced by the applicant to show the operating expenses and revenue of the company if all expense of producing the gas were eliminated from operating expense and, instead thereof, a charge to operating expense were made as though the gas were purchased at the surface. Mr. Ware, a witness in behalf of the applicant, testified as to this matter (see Ware Exhibit No. 3; R. page 313 et seq.). It will be noted that Mr. Ware testified that if the gas produced were purchased at the average price paid by it for purchased gas, for the year 1926 the net operating revenue would be \$69,400, or this amount would be applicable for return and depreciation on P.U.R.1928B.

the applicant's property, except all property used in connection with production, which is eliminated in making the estimate. He further testified that on this basis there would be a deficit of \$9,100 for West Virginia, and a net return from Maryland of \$78,500. For the year 1927, on the same basis, on a net return of \$56,900, there would be a deficit of \$18,700 from the West Virginia business, and a net return of \$75,600 from the Maryland business. It will be noted from Mr. Ware's testimony that the estimated net revenue for 1926 and 1927 would be materially less if the gas were purchased at the average price paid rather than produced by the company.

Mr. Jirgal testified as to this same matter (see Jirgal Exhibit No. 2, page 2 et seq.), but he uses the actual production for the year 1925 as a basis. He finds, if the company purchased the gas it produces at the average price which it pays for purchased gas, that its net return for the year 1925 would have been \$45,846.89, or that amount would have been applicable for return, depletion, and depreciation on all the company's property except that used in the production of gas, which is excluded from the estimate.

There has been some contention that leaseholds should be valued at the original cost. In the light of recent decisions, it is difficult to see how this contention can now be made.

In the case of *Charleston v. Public Service Commission*, 95 W. Va. 91, P.U.R.1924B, 601, 120 S. E. 398, which involved the valuation of property of a large gas company, the syllabus prepared by the court contained the following:

1. Gas—*Company Entitled to Fair Return on Fair Value of Property.* A public service company, furnishing natural gas to the public, is entitled to a fair return upon the present fair value of its property used and useful in the public service. Such fair value is to be ascertained as of the time the service is rendered.

2. Same—*Company Entitled to Appreciation in Leaseholds Over Investment Costs.* Consequently it is entitled to have included in its present fair value, as a rate base for rate-making purposes, appreciation in the value of its gas leaseholds over investment cost.

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3. Same—*Evidence of Appreciated Value of Leaseholds Must Be Based on Evidence Independent of Earnings.* But in a rate-making case evidence of the appreciated value of such leaseholds to be competent must not be based upon, but must be independent of, the rates of return or earnings.

In the case of *Natural Gas Co. v. Public Service Commission*, 95 W. Va. 557, P.U.R.1924D, 346, 121 S. E. 716, the following rule is laid down by the court as applicable in the determination of the value of gas leaseholds:

"Where in a rate proceeding a natural gas utility company seeks to include in the rate base, as a part of the present fair value of its property, appreciation in the value of its leaseholds over investment cost, an account of the delay rentals on the leaseholds, which have been paid by the public as operating expenses of the utility, should be taken and given due weight; if the rentals so paid equal or exceed the appreciation in value of the leaseholds over investment cost, such appreciated value should not be included as a part of the rate base. To so include it would permit the company to capitalize expenses paid by the public and thus inequitably require the public to pay a return thereon."

It is noticeable in both of the above-mentioned West Virginia decisions the court held that the gas company is entitled to the appreciated value of the leaseholds. By this I assume it means the present market value. However, in the case of *National Gas Co. v. Public Service Commission*, *supra*, which was decided a few months after the case of *Charleston v. Public Service Commission*, *supra*, the court held that where delay rentals are charged to operating expense, this must be deducted from the appreciated value, and if this deduction exceeded the appreciation, then the actual amount invested, should be taken as the value of the leaseholds.

It seems to me, in view of the recent decision of the supreme court of appeals of this state in the case of *Elkins v. Public Service Commission*, 102 W. Va. 450, P.U.R.1927B, 270, 135 S. E. 397, wherein the rule laid down in *Charleston v. Public Service Commission*, *supra*, was reaffirmed, and the decision of the United States Supreme Court in the case of *Public Utility Comrs. v. New York Teleph. Co.* 271 U. S. 23, 70 L. ed. 808, P.U.R.1928B,

P.U.R.1926C, 740, 46 Sup. Ct. Rep. 363, that that part of our court's decision in the case of Natural Gas Co. v. Public Service Commission, *supra*, which establishes the rule that delay rentals shall be deducted from the appreciated value of the leaseholds and value arrived at on that basis, has been clearly overruled and should not govern us in this case.

"Constitutional protection against confiscation does not depend on the source of the money used to purchase the property. It is enough that it is used to render the service. . . . The customers are entitled to demand service and the company must comply. The company is entitled to just compensation, and, to have the service, the customers must pay for it. The relation between the company and its customers is not that of partners, agent and principal, or trustee and beneficiary. . . . *The revenue paid by the customers for service belongs to the company.* The amount, if any, remaining after paying taxes and operating expenses, including the expense of depreciation, is the company's compensation for the use of its property. If there is no return or if the amount is less than a reasonable return, the company must bear the loss. Past losses cannot be used to enhance the value of the property or to support a claim that rates for the future are confiscatory. . . . And the law does not require the company to give up for the benefit of future subscribers any part of its accumulation from past operations. Profits of the past cannot be used to sustain confiscatory rates for the future. . . .

"Customers pay for service, not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses or to capital of the company. By paying bills for service they do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company. Property paid for out of moneys received for service belongs to the company just as does that purchased out of proceeds of its bonds and stock." (*Supra*, at pp. 31, 32, of 271 U. S., P.U.R.1926C, at pp. 744-746.)

"That property of a gas company was secured largely from earnings received from ratepayers does not change its status as private property so as to eliminate it from consideration in fixing the total value of the company's property as the rate base." P.U.R.1928B.

Erie v. Public Service Commission, 278 Pa. 512, P.U.R.1924D, 89, 123 Atl. 471.

In the case of *People ex rel. Pennsylvania Gas Co. v. New York Pub. Service Commission*, 211 App. Div. 253, P.U.R. 1925C, 608, 615, 618, 207 N. Y. Supp. 599, the court made the following statements in regard to the valuation of gas lands:

"In the present case we may examine the facts to see whether there is substantial evidence on which the valuation of petitioner's gas lands fixed by the Commission could reasonably have been found to be the present value of those lands. The company is entitled to a reasonable return on the value of the property used in the public service at the time it is being so used. *Bluefield Water Works & Improv. Co. v. Public Service Commission*, 262 U. S. 679, 67 L. ed. 1176, P.U.R.1923D, 11, 43 Sup. Ct. Rep. 675; *Missouri ex rel. Southwestern Bell Teleph. Co. v. Public Service Commission*, 262 U. S. 276, 67 L. ed. 981, P.U.R.1923C, 193, 43 Sup. Ct. Rep. 544, 31 A.L.R. 807.

"It is apparent that the Commission has set aside the testimony of present market value of these gas lands by considerations not altogether pertinent to the segregated value of this portion of the company's property. It is immaterial 'that the production of natural gas in the Pennsylvania fields has been progressively diminishing since the year 1917,' since the witnesses testified to value of these specific fields as of the spring of 1920, the time of the hearing. Moreover, if there is a progressively diminishing supply of natural gas in the Pennsylvania fields generally, it is difficult to see why that should not tend to enhance the value of such supply of gas as remained in the petitioner's gas fields, under the economic law of supply and demand. Complaints of consumers as to 'inadequacy of service due to failure of supply' do not reasonably overcome the specific testimony of the witnesses as to the value of these specific gas lands. The testimony shows that there was a very great increase (60 per cent) in gas deliveries from 1908 to 1917, with no substantial decrease since 1917, notwithstanding the fact that the Commission's conservation order must have reduced the demand. The complaints were simply with reference to a failure to meet full demands of consumers in the peak of severe winter weather. It P.U.R.1928B.

does not necessarily follow that a failure of supply to meet these demands was due to lack of supply at the field. It may have been due to many intervening causes, including the weather or improper service unrelated to the possible supply of gas. Upon the question of the present value of these gas lands, the testimony of the witnesses as to market value cannot be overcome by assuming, even if true, that the past operations of the petitioner have been exceptionally profitable. Such a fact is more properly to be reflected, if at all, in the rate of return to be allowed."

In the case of American-Indian Oil & Gas Co. v. Poteau, 108 Okla. 215, P.U.R.1926A, 236, 235 Pac. 906, the supreme court of Oklahoma (after considering the cases of Erie v. Public Service Commission, *supra*, and Charleston v. Public Service Commission, *supra*), held that the fair value of the natural gas lands was the market value thereof.

In the case of Erie v. Public Service Commission, *supra*, at pp. 93, 94, 97-101, of P.U.R.1924D, the court had under consideration the valuing of natural gas lands, and it seems to me the following, copied from the opinion in that case, has bearing upon that subject:

"Decisions of a state court relative to a property's status 'constitute rules of property and must be accepted and applied in passing on complainants' rights.' Guffey v. Smith, 237 U. S. 101, 113, 59 L. ed. 856, 35 Sup. Ct. Rep. 526. The right of property in natural gas and oil in all the states save Indiana, as stated in Brown v. Spilman, 155 U. S. 665, 669, 39 L. ed. 304, 15 Sup. Ct. Rep. 245, belongs to the owners of the land; they are a part of the land so long as they are on it or in it or subject to control therein. Petroleum, oil and natural gas can be severed from the ownership of the surface by grant or exception as separate corporeal rights. Kansas Nat. Gas Co. v. Haskell (C. C.) 172 Fed. 545, aff'd 221 U. S. 229, 55 L. ed. 716, 31 Sup. Ct. Rep. 564, 35 L.R.A.(N.S.) 1193; 224 U. S. 217, 56 L. ed. 738, 32 Sup. Ct. Rep. 442. In our state, in Hamilton v. Foster, 272 Pa. 95, 102, 116 Atl. 50, we held that oil and gas are minerals, and while in place are part of the land. They may be the subject of sale, separate and apart from the surface, and from any other minerals beneath it. They belong to the owner in fee, or his grantee, as long as they remain part of his P.U.R.1928B.

property, though use is not possible until severed from the freehold exactly as done with all other minerals beneath the surface. This is the effect of Mr. Justice Van Devanter's decision in *Pennsylvania v. West Virginia*, 262 U. S. 553, 586, 67 L. ed. 1117, P.U.R.1923D, 23, 27, 43 Sup. Ct. Rep. 658, 660, when he said:

"'Natural gas is found at pronounced depths in porous strata—usually sand rock—constituting a natural reservoir and is brought to the surface and reduced to possession through wells drilled into the containing strata. When a surface owner thus reduces it to possession, he becomes its owner and it becomes a subject of commerce, like any product of the forest, field or mine.'

"Oil and gas are minerals in which a freehold of inheritance may be created. *Re De Witt's Estate*, 266 Pa. 548, 109 Atl. 639; *Citizens' Gas Co. v. Whitney*, 232 Pa. 592, 81 Atl. 804; *Rockwell v. Warren County*, 228 Pa. 430, 77 Atl. 665, 139 Am. St. Rep. 1006; *Barnsdall v. Bradford Gas Co.* 225 Pa. 338, 74 Atl. 207, 26 L.R.A.(N.S.) 614; *Prager's Estate*, 74 Pa. Super. Ct. 592.

"Being a freehold, to which value attaches while enclosed under the ground, how then shall they be valued for rate-making purposes? . . .

"If we were to make the return on original cost of these gas lands, plus the cost of production, the measure for the price of gas to be sold to the consumer, we would establish an economic theory of value and sale for this kind of a utility differing from that applied to others. And the fact that gas stored in these lands is taken from thence and sold, ultimately consuming the entire product, does not alter the rule. In that respect it is no different from any physical plant having a life of twenty years—an oil field or lumber operation. Present value is what we are now dealing with and as to gas lands, it includes at the time fixed such elements as depreciation, depletion, and the like. . . .

"The theory of municipalities in applying cost basis that individuals purchasing gas lands (and there is no reason why, if it is correct, it should not be applied to any species of property) 'should give thanks to Providence' because it is afforded the opportunity of being extremely prosperous and well rewarded P.U.R.1928B.

through the enormous production sold to consumers from such low-priced lands, overlooks the fact that, no matter what the production may be, the rate (fair return) is applied on the rate base. As production increases the rate must decrease, for the line fixed is fair return on the rate base. 'The company is entitled to receive a reasonable return for the service it furnishes, and no more.' *Philadelphia City Passenger R. Co. v. Power Service Commission*, 271 Pa. 39, 56, P.U.R.1921E, 581, 114 Atl. 642, 648. These considerations do not give to the owners of this class of lands the same constitutional protection accorded other property. It singles out this land for confiscation for the benefit of the ratepayer. We have not yet adopted this system of division of property. Nor can we adopt the other equally erroneous theory that the public is entitled to share in the appreciated value. It is merely a modification of the preceding one. As the point of division could not be controlled by any known rule, it would cause this property to be subject to a will which could be arbitrary without a governing hand to restrain its application. The same observation may be made as to 'sum prudently invested.' . . .

"The standard to be applied in fixing present value of the lands would be 'present market value.' *Denver v. Denver Union Water Co.* [246 U. S. 178, 62 L. ed. 649, P.U.R.1918C, 640, 38 Sup. Ct. Rep. 278]; *Willcox v. Consolidated Gas Co.* [212 U. S. 19, 53 L. ed. 382, 29 Sup. Ct. Rep. 192, 15 Ann. Cas. 1034, 48 L.R.A.(N.S.) 1134]. In so considering it (*Minnesota Rate Cases* [230 U. S. 352, 57 L. ed. 1511, 33 Sup. Ct. Rep. 729, 48 L.R.A.(N.S.) 1151, Ann. Cas. 1916A, 18]), a greater value cannot attach because used in public service. The rule is limited to general market value outside the public service, or in a market not considering such service. While this may call for careful scrutiny of the evidence, such considerations afford no excuse for refusing to give the value required by law. The rule was applied in valuing Neville Island. *Ben Avon v. Ohio Valley Water Co.* 271 Pa. 346, P.U.R.1921E, 471, 114 Atl. 369. The test, under the 14th Amendment, in rate cases, is whether the utility is deprived of its property or a part of its value in the return allowed. The rule of just compensation, as in condemnation cases, should be applied to gas lands (*Smyth v. Ames* [169 P.U.R.1928B.

U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418]; *Reagan v. Farmers' Loan & Trust Co.* 154 U. S. 362, 410, 38 L. ed. 1014, 14 Sup. Ct. Rep. 1047, 4 Inters. Com. Rep. 560; *Minnesota Rate Cases*, *supra*; *Mercersburg L. & M. Electric Co. v. Public Service Commission*, 76 Pa. Super. Ct. 58, 65), though generally the rate case may include elements not properly cognizable in condemnation cases. Property is protected by protecting its value, which, in this class, is what it is worth in a fair market. In fixing market value for a present value, we bring the holdings under the constitutional protection governing condemnation for public or quasi public uses.

"The Commission correctly summarized the law in these words:

"Gas holdings should be included and evaluated only to the extent that they represent developed, used and useful territory, including a reasonable reserve for the continued functioning of the company in its public service. Such holdings should be included in the rate base at their present value."

"Our difficulty lies in the paragraph immediately following the one quoted from the findings, wherein the Commission says this value 'cannot be determined on the basis of what gas can be sold for in some particular locality or in the locality where it is produced.' This would be correct if the commodity value was all there was before the Commission and it was the basis on which present value was to be reached. The company produced witnesses who testified the market value of the 16 selected warrants was from \$7,212,000 to \$10,000,000, and the Ludlow field \$4,000,000. It appears these gas fields were developed, defined, and have been in actual operation producing gas from a known sand for a great many years, sufficient to show the quality. It is no longer doubtful, among those familiar with the business, whether expert geologists or engineers or practical gas-producing men, that the remaining life of the fields can be determined with reasonable accuracy—with as much accuracy as is used in dealing with ordinary affairs of life. While this may be said to be matters of conjecture, because not seen, as is a seam of coal, they may suddenly end, the frequency of this in a defined territory is remarkably small. It is on such examinations large sums

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of money are invested. Most of the witnesses base their estimates on their knowledge of the field in general. The location of the lands was shown, location of the wells, the date each well was drilled, its depth, the character of sand in which gas was found, its thickness, the initial open flow volume of gas, the initial present rock pressure, the line pressure, the volume of gas delivered January, 1920, by each well into the line against the line pressure, together with the details of measurement on which the computation of the present volume is based. The Commission finds that the Elk fields had an average daily yield of \$102,000 cubic feet, discharging into the lines against a pressure of 115 pounds, and an average daily yield from the Ludlow field of 34,000 cubic feet. Disregarding the testimony of Hill and Gaffney as to value, four other witnesses testified to a demand for the supply and what natural gas lands would sell for in and about that territory. The Commission, in valuing the gas holdings, stated:

"Taking into consideration the total gas holdings of the respondent, with all the testimony bearing on their present value, we are of the opinion that the used and useful portions attributable to Pennsylvania should be included in the rate base of \$5,550,000."

"The lowest value under the evidence was \$11,212,000. It is apparent, from what the Commission said, they proceeded on an erroneous conception of the evidence. Much if not all of the same testimony would have been admitted as evidence of market values in condemnation of the same land. No attack was made on the competency, sufficiency, or credibility of the witnesses to establish the fact of general market value."

Value of Property Other than Leaseholds

It is now necessary for us to consider the fair value of the physical property other than the leaseholds.

A summary of the value of the property claimed by the company—except working capital, going concern value, and the value of leaseholds—is found in the "Appendix" of the brief filed on behalf of the gas company and in Smith Exhibits Nos. 1 and 2. P.U.R.1928B.

The following is a brief summary of the value claimed on different classes of property:

A.—Well group	\$778,812.00
B.—Field group	1,043,829.00
C.—Transmission group	3,866,692.00
D.—Distribution group	1,642,602.00
E.—General group	63,097.00
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Corporate cost	\$7,395,032.00
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Total	\$8,258,351.00
Value of leaseholds (Horner)	592,052.00
Working capital	203,163.00
Going concern value	1,209,614.00
	<hr/>
	\$10,263,180.00

The reproduction cost new of the applicant's property, designated as the Well Group, is set out in Smith Exhibit No. 1, being Part 1 of his inventory and appraisal. A summary of this reproduction value, together with rate of depreciation, is as follows:

	<i>Cost New</i>	<i>Depreciation</i>	<i>Cost New Less Depreciation</i>
Gas well construction	\$923,668.00	43.57%	\$521,242.00
Gas well equipment	447,708.00	43.57%	252,654.00
Drilling and cleaning equipment	9,596.00	48.77%	4,916.00

It is noticeable Mr. Smith does not try to depreciate this property by taking the observed depreciation. This, of course, is probably due to the fact that it is impossible to see the exact condition of the pipes in the ground, and, therefore, he depreciates the property on the basis of the estimated life of the wells. In other words, depreciation is established by applying to reproduction cost a ratio which the elapsed life of the wells bears to the estimated total life of the wells, and by this method depreciates the gas well construction and cost of well equipment 43.57 per cent.

The gas well construction cost, or the drilling of the hole in the ground, is practically twice the amount of the cost of the gas well equipment. Mr. Hall, the assistant engineer of the Commission, testified the well itself, or the hole in the ground, is in practically 100 per cent condition.

In view of the fact that the pipe is not visible, and well con-
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struction is also depreciated, it seems to me it would be difficult to use a fairer method than that used by Mr. Smith in determining the depreciation of the gas well equipment.

If Mr. Hall's statement is correct, that the hole is in 100 per cent condition, then it would seem the result is the gas well equipment is taking the entire depreciation for gas well equipment as well as gas well construction, and wipes out, as a matter of fact, any value for gas well equipment. In other words, if we allow nothing for gas well equipment and only allow for gas well construction (which is in 100 per cent condition), then the value of the well group would be \$928,584, which gives a value of approximately \$150,000 more than claimed by the gas company. If observed depreciation were deducted from the value of this property, then, under the evidence, the value of the well group would be \$928,584 instead of \$778,867.

Mr. Hall was called on behalf of the protestants to testify in regard to the well group and he stated that, according to his method of estimating, the wells are in 12.26 per cent condition, or they have been depleted 87.74 per cent. It is noticeable this calculation is based entirely upon the determination of the amount of gas that has actually been removed and that which it is estimated will be removed in the future. It is difficult to see what possible relation to the value of the gas well group this estimate can have. As a rule, the production of gas from a gas well in the early years of its life is very great and the production gradually decreases, so it is difficult to see how the total production from a well can be used as a basis for determining the length of time the well will be used in the future. I think it is quite evident from Mr. Hall's testimony that in making his estimate he had in mind determining the amount that should have been set aside to amortize the investment in the well group and determined the amount that should be allowed for this purpose.

I think Mr. Smith's valuation of the well group should be accepted, except as to overheads, engineering, etc., which I have modified as appears from the summary which hereafter follows.

The protestants' contention as to the reproduction cost of labor and material is the same as made in connection with other property, which will be considered later. It might be well to note P.U.R.192SP.

here that Mr. Williamson gives the book cost of the well group as \$1,577,005. This amount includes \$63,754 for leaseholds, which, if deducted, leaves the book cost of the well group at \$1,513,251.

By the application of index figures to the book cost of this property, Mr. Jirgal finds the value to be \$1,590,537. If this amount is depreciated 45.30 per cent—the average depreciation fixed by Mr. Smith on the well group—we would have \$870,024.

*Physical Property Other than Leaseholds, Wells and Well
Equipment Property*

In Smith Exhibit No. 2, being Part II of applicant's inventory and appraisal of its property other than leaseholds, is found an inventory and appraisal of applicant's property other than leaseholds and well property equipment, which is covered by Smith Exhibit No. 1. In other words, there is included in this exhibit property designated as "Field Group," "Transmission Group," "Distribution Group" and "General Group."

As to the value of this property, Mr. Smith gives the following figures:

Reproduction cost new	\$7,252,222.00
Accrued depreciation	636,002.00
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Reproduction cost new less depreciation	\$6,616,220.00
Corporate cost	725,222.00
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Total	\$7,341,442.00

It will be noted Mr. Smith does not depreciate corporate cost.

For this class of property Mr. Williamson and Mr. Jirgal give the book cost as of December 31, 1925, as \$3,148,059.

By applying index figures to the book cost of this property, Mr. Jirgal finds the amount of \$7,041,319. If the cost of this property, as determined by index figures, is depreciated 8.13 per cent (the average of the depreciation adopted by Mr. Smith) we would have \$6,468,860.

The protestants insist that Mr. Smith's valuation, as contained in Smith Exhibit No. 2, is too large and their principal contentions are:

1. That the labor cost of 50 and 55 cents per hour for common labor used by Mr. Smith is too great an allowance.

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2. That the unit cost of material used by Mr. Smith in his appraisal is too high.

3. That there is included in Mr. Smith's inventory and appraisal a large amount of property which is not used and useful.

4. That the depreciation of the property, exclusive of leaseholds is much greater than fixed by the applicant's engineers.

5. That the allowance for engineers, field supervision, etc., and for overheads, is excessive.

6. No allowance should be made for contractors' profits.

7. Property included in the valuation that has been paid for by consumers.

Let us consider these matters in the order named.

In his appraisal, Mr. Smith has allowed 50 cents and 55 cents per hour for common labor. It appears from his testimony that, in making this allowance, he gave consideration to the fact that the whole plant—except 10 per cent of the wells—was to be completed in two years and, in order to accomplish the work in two years, the full quota of men must be on the work at the beginning and continue steadily through the two-year period.

It seems to be the rule of engineers, in arriving at the reproduction cost new, to consider the property shall be constructed in the shortest time possible and estimates are based on this. It also seems to be the rule of engineers, in arriving at the labor cost of reproducing a property new, to consider in their estimates that labor will perform a certain amount of work in an hour. That is, if the estimate provides for the allowance of 50 cents per hour for labor, before comparison can be made with other labor estimates lower than that, we must know the performance of the labor at the lower cost. It is true labor may be had at 40 cents or 45 cents an hour, but unless it appears that labor employed at this rate performs the same amount of labor accredited to the labor paid 50 cents an hour, the comparison is not of great value.

A number of witnesses, testifying in behalf of the protestants, stated common labor could be had at from 30 cents to 35 cents an hour. However, it is evident these witnesses did not have in mind the fact that the whole plant must be constructed in two years, that a full quota of labor must be on hand from the start
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to the finish of the work, and many of the men must be cared for in camps, or that the labor would do the amount of work that labor paid 50 cents or 55 cents an hour is credited with.

Mr. Graham, who testified in behalf of the protestants, stated he worked for the applicant's predecessors when a long line of transmission pipe was installed, that he brought in a great deal of foreign labor, secured from Pittsburgh and other points, and on one occasion brought in 120 men. He said these men were paid 50 cents a day more than other common labor.

Mr. Gribble, assistant manager of the Hope Natural Gas Company, testified his company, in 1925, constructed approximately 85 miles of 20-inch pipe and 36 miles of 16-inch pipe through Ritchie, Gilmer Calhoun, Roane, Kanawha, Clay, and Boone counties; that this line was in a more favorable territory, as to topography, than the Cumberland & Allegheny Gas Company's territory; that in the construction they averaged from 300 to 800 men per day, and for common labor paid 45 cents and 50 cents per hour.

In the Engineering News Record for January 13, 1927, at page 78, there appears an article entitled "Spring Prices for Material, 1923 to 1926." This article also gives the average common labor rate per hour for the United States for the months of April, May, and June for each year from 1913 to 1926, both inclusive.

In April, 1925, the average common labor rate per hour was $54\frac{1}{4}$ cents; May 54 cents; June 53 cents; average for the three months $53\frac{3}{4}$ cents.

In April, 1926, the average common labor rate per hour for the United States was $54\frac{1}{4}$ cents; May 55 cents; June 55 cents; average for the three months 55 cents.

On January 13, 1927, the average common labor rate per hour for the United States was $55\frac{3}{4}$ cents. The general average for the three months of April, May, and June from 1913 to 1926, both inclusive, was 40 cents per hour.

In the Monthly Labor Review (issued by the United States Department of Labor), Vol. 23, No. 6, issue of December, 1926, there appears at page 145 a table showing the hourly wage rates paid for common labor on October 1, 1926. Under the title P.U.R.1928B.

"Public Utilities" there appears for the east north central part of the United States a low wage rate of $32\frac{1}{2}$ cents; high 60 cents; average $48\frac{1}{2}$ cents. For the west north central states, low wage rate 30 cents; high 40 cents; average 36.2 cents. For the Middle Atlantic states, low wage rate 30 cents; high 61.3; average $44\frac{1}{2}$ cents.

In the Engineering News Record for January 6, 1927, the following statement appears at page 42 relating to common labor:

"Engineering News Record's *Construction Cost Index Number is 2 Per Cent Above January, 1926*. The increase is due mainly to labor, which is 3 per cent higher than a year ago. Lumber is cheaper than in 1926; cement about the same; steel appears firmer, with less tendency to cut under. The average rate for common laborers is $55\frac{3}{4}$ cents per hour, against 54 cents at this time last year. Thus, general construction cost is 0.3 per cent above December, 1926, 23 per cent under the peak, and 111 per cent above 1913."

In my opinion, the allowance of 50 cents and 55 cents an hour for common labor, when we consider the performance required, is not too large and should be accepted.

There is some testimony offered by one of protestants' witnesses that the unit cost of material used by Mr. Smith in his appraisal was too high, but nothing substantial was offered along this line. It does appear that on some few items the unit cost would seem high, but on others it is low, and, taken as a whole, the unit prices for material are fair and as near accurate as it would be possible to obtain in an appraisal of such magnitude.

The Maryland Public Service Commission, which valued this property, gave consideration to the question of the unit costs used by Mr. Smith, and reached the conclusion that they were fair and reasonable. That Commission, in its report, stated in regard to this matter as follows:

"An estimate of the reproduction cost of the physical property was made for the company by Sanderson and Porter. As previously stated, the engineering staff of this Commission spot-checked the inventory and then checked in detail the unit prices used by Sanderson and Porter and their application. While not P.U.R.1928B.

agreeing in all details, yet the engineering staff finally accepted the company's figure as a fair estimate of the reproduction cost of the physical property before depreciation. It was felt that the cost of labor at 50 cents an hour was probably higher than it would have been necessary to pay; but in determining the cost of labor as it finally enters into the cost of the work, it is necessary to determine the amount of work which can be done by a laborer. It was found that this amount of work as estimated by Sanderson and Porter was greater than the engineering staff believed could be done day in and day out; and so, in the end, the labor cost entering into the work, as estimated by our engineers, checked very closely with the labor cost as estimated by Sanderson and Porter. This is likewise true of other elements entering into the reproduction cost new of the work, and Mr. Wolf, instead of presenting an independent estimate of the cost of the physical property, accepted the estimate presented by Sanderson and Porter. Therefore, the Commission had before it an agreed estimate as to the cost of reproducing anew the physical property of the company."

It is also contended by the protestants that the applicant's plant is overbuilt and much property is included in its valuation which is not used and useful. After a consideration of the evidence, I am satisfied this contention merits consideration only in connection with the company's transmission lines.

It will be noted from the map filed that between Thomas Station and a point where a branch line takes off for Philippi, there is a 12-inch line and a 10-inch line, and beginning at a point east of Belington and running to Parsons is a 10-inch line and a 6-inch line. There is evidence that these lines are required and necessary for the successful operation of the plant, and there is evidence to the contrary. I think the 10-inch line from Thomas Station to a point near where the line to Philippi takes off could be dispensed with and service maintained; and that the 6-inch line beginning east of Belington and running to Parsons is much larger than absolutely necessary in that it exceeds 4 inches. As explained by Mr. Horner, it is very desirable to have duplicate lines in case of emergency and for storage, and in view of the reducing gas pressure, it is necessary to have very large

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pipes or duplicate pipes. I believe, in view of the fact that the fact that the communities served—which are absolutely dependent upon gas for heating and cooking—and knowing the hardship that would be caused by an interruption in the supply of gas, a duplication of the entire transmission line would be justified.

The protestants contend that the transmission and distribution line should be highly depreciated. Practically the only evidence as to the condition of the transmission line is that furnished by the applicant company. Both the applicant and protestants furnish much evidence as to the condition of the distribution line. Outside of the testimony of Mr. Hall as to the condition of the well group, the testimony of the applicant's witnesses on this matter is uncontradicted. The protestants did not introduce any evidence as to the depreciation of the field group, or that group which contains the field line, etc.

Mr. Smith gives the cost of reproducing the transmission line new as \$3,281,974 and finds the depreciation 8.20 per cent, or \$269,122. He finds the line equipment of distribution group cost \$1,193,024 to reproduce new and that the depreciation is 7.82 per cent, giving the depreciated value thereon \$1,098,680 and the depreciated value of the transmission line and distribution line, together, is \$4,111,532. This amount does not include overhead, but does include allowance for engineering and field supervision. Outside of the gas holdings, the average depreciation of the property found by Mr. Smith is 14.40 per cent.

Mr. Wolf, the chief engineer of the Public Service Commission of Maryland (which Commission valued this same property as appears from its report), found the average depreciation upon the property, exclusive of leaseholds, to be 24.3 per cent. I do not think, under the evidence, it can be contended that the transmission lines and field lines should be depreciated 25 per cent, and the distribution lines 35 per cent, but for the purposes of this analysis, I have adopted those amounts on this class of property.

As to the depreciation of property contained in Smith Exhibit No. 2 other than transmission, distribution, and field line
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construction and equipment, there is little, if any, substantial evidence except that given by the applicant's witnesses. Mr. Smith finds the depreciation on this class of property averages 8.13 per cent. For the purposes of this analysis, I have deducted on this class of property 15 per cent for depreciation.

Mr. Smith has included in his reproduction cost new an allowance of \$162,327.78 for contractors' profits. When this amount is subjected to the depreciation herein made, the allowance is considerably below the figure given above. I think it is quite generally recognized that it is proper to include in the reproduction cost an allowance for contractors' profits, and it does not seem to me the amount allowed by Mr. Smith is excessive. *Milwaukee Electric R. & Light Co. v. Milwaukee (Wis.) P.U.R.1918E, 1; Brooklyn Borough Gas Co. v. Prendergast, — F. (2d) —, P.U.R.1927A, 200; Spurr's "Guiding Principles of Public Service Regulation," Vol. 1, page 394, et seq.*

It is contended by the protestants that Mr. Williamson and Mr. Jirgal have included in their statements as actual investment, or book cost of the property, \$707,467.26, which was paid for as an operating expense and paid for by the consumers, and, therefore, should not now be included in the value of the property.

It is true under the system of accounting prevailing at one time, certain property was charged to operating expense. However, to get the actual book cost, or investment in the property, it was necessary for the accountants to include this amount in investment, and their reports show this. Their reports also show that when they included this amount in investment, they also added it to earnings, and the earnings of the company were increased that amount.

If, as a matter of law, we would be justified in deducting \$707,467.26 from the valuation, the facts would not justify it. The mere fact that certain investments were charged in the operating expense does not mean the consumers paid for it. The evidence in this case shows that this Commission, in all former cases involving the property of this company, did not include in the book cost, or its valuation of the property, the amount of \$707,467.26, cost of labor and teaming in connection with drill-
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ing wells, and cost of Braxton county development, which I now think was clearly erroneous. The Company did not earn on this amount and no provision was made to amortize it.

The evidence in this case clearly shows that for many years the applicant has not received revenue from its consumers sufficient to pay operating expenses, provide for depletion and depreciation, and for a return upon the fair value of its property. In view of this situation, it is difficult to see how the consumers paid for any property. The investment charged to operating expenses was paid for at the expense of providing for depletion and depreciation and return.

It seems to me there is a misapprehension as to the object of charging into operating expense the cost of property that usually is charged to capital. It is well established in this state that a utility supplying natural gas is entitled to receive revenue from its consumers not only sufficient to pay operating expenses and provide for a return on the fair value of the property employed in the service, but also an amount, annually, sufficient to retire the amount invested in the plant at the end of the life thereof. We speak of this as amortizing the investment, and the amount allowed for this purpose as the allowance for depletion and depreciation.

At one time it was customary for gas utilities to charge to operating expense labor cost in connection with drilling wells and laying field lines, and the Commission has, in different cases, allowed other property to be charged to operating expense. The charges were made in this way by reason of the fact that it was felt the property had a short life and the investment therein should be retired as rapidly as possible so that after this property had gone out of use it would not be continued in the property account until such time as an amount might have accumulated through the annual allowance to retire this property. In other words, the property was charged to operating expense for the purpose of providing as early as possible an amount for the retirement of the property. This property had to be paid for and retired at some time, and by reason of the short life of the property it was charged to operating expense and in that way provision was made for funds to retire the property before it went P.U.R.1928B.

out of service. It was never contemplated the company should not earn on such property, and the only consideration that should be given to the charges for property made to operating expense is in connection with the determination of the amount of property still to be retired and the proper allowance for that purpose.

It makes no difference how the property was acquired; if it belongs to the company it has the right to earn on it. In the recent case of *Public Utility Comrs. v. New York Teleph. Co.* (1926) 271 U. S. 32, 70 L. ed. 808, P.U.R.1926C, 740, 744, 746, 46 Sup. Ct. Rep. 363, which case has already been referred to, the Court decided among other things that:

1. Constitutional protection against confiscation does not depend on the source of the money used to purchase the property used by a utility.

2. The revenue paid by the customers for service belongs to the company and the law does not require the company to give up, for the benefit of future subscribers, any part of its accumulations from past operations.

3. Payments by customers for service is not for the property used to render it. Their payments are not contributions to depreciation or other operating expenses, or to the capital of the company.

4. The relation between the utility and its customers is not that of partners, agent and principal, or trustee and beneficiary.

Erie v. Public Service Commission (1924) 278 Pa. 512, P.U.R.1924D, 89, 123 Atl. 471, 475.

Engineering, Field Supervision and Contractors' Profits

Mr. Smith has included in his appraisal for engineering, field supervision and miscellaneous field cost 10 per cent of the cost of the physical property included in Smith Exhibits Nos. 1 and 2, but exclusive of all overheads and cost of engineering, field supervision, and miscellaneous field cost. The allowance for this purpose should not exceed 7 per cent of the physical property exclusive of engineering and all overhead. Mr. Smith has also included in his appraisal an allowance of \$162,327.78 for contractors' profits, which does not seem to me to be unreasonable. P.U.R.1928B.

Overheads

For omission and contingency Mr. Smith has allowed 1.5 per cent, including engineering, field supervision, and miscellaneous field cost. In my opinion the allowance of 1.5 per cent for omission and contingency is a proper one.

For general cost Mr. Smith allows 8.73 per cent of the cost of the property included in his Exhibits Nos. 1 and 2, less all overheads, engineering, field supervision, etc. This general cost is made up of interest during construction, taxes, and general office expense. In my opinion this allowance should not exceed 7 per cent.

For corporate cost, which includes promotion, organization, and cost of financing, Mr. Smith allows 10 per cent. In my opinion this allowance should not exceed 6 per cent,—4 per cent for cost of financing and 2 per cent for promotion and organization.

I do not find the protestants have offered any evidence as to cost of engineering, field supervision, miscellaneous field cost, and overheads.

For all overheads, field engineering, field supervision, and miscellaneous field cost, I have allowed a total of 21.5 per cent.

In the case of *Re United Fuel Gas Co.* P.U.R.1925B, 705, 714, this Commission allowed interest during construction as well as cost of financing as an overhead. I do not think the propriety of allowing these overhead charges can be questioned. There can be no doubt there should be an allowance, as an overhead, for omissions and contingencies, promotion, organization, taxes, and general office expense during construction, as well as for engineering and supervision.

Re Bluefield Water Works & Improvement Co. 11 Ann. Rep. W. Va. P. S. C. 225, P.U.R.1924D, 325; *New York & Richmond Gas Co. v. Prendergast*, 10 F. (2d) 167, P.U.R.1926B, 759; *Ohio Utilities Co. v. Public Utilities Commission*, 267 U. S. 359, 69 L. ed. 656, P.U.R.1925C, 599, 45 Sup. Ct. Rep. 259.

In the case of *Brooklyn Borough Gas Co. v. Prendergast*, — F. (2d) —, P.U.R.1927A, 200, 239, the Master, whose report P.U.R.1928B.

was confirmed by the Court, reported the following overheads as proper and should be allowed:

"Omissions and contingencies, 5 per cent of the equipment at gas plants, including gas holders, \$1,007,238.49, equalling \$50,-361.92.

Organization and development prior to construction, 5 per cent of all reproduction costs and expenses, including working capital, but excluding going value and cost of financing, amounting to the sum of \$6,542,871.13, equalling \$327,143.55, which the plaintiff approximates at \$325,000.

Cost of financing, same base used as in preceding paragraph, adding the cost of organization and interest thereon, bringing the base up to the sum of \$6,540,556.09, and dividing that sum by 19 per cent, results in the sum of \$344,239.79, which the witness and the plaintiff approximate at \$344,000 as the cost of financing.

Engineering and superintendence and general contractors' expense and profit, 13 per cent of the reproduction cost of equipment at gas plant, omissions and contingencies, buildings and appurtenances, and mains, totaling \$3,382,547.18, equals \$439,-731.13.

Interest during construction 'at the rate of 8 per cent for the obtaining of the requisite new capital by a gas company in this territory;' 8 per cent for six months on total value of equipment, apparatus, buildings, and appurtenances, including engineering and contractors' profits and expense and administrative expense, all in the sum of \$3,917,835.27, equals \$156,713.41, plus interest for one year at the rate of 8 per cent per annum on the value of the land, \$430,000, equals \$34,440, plus interest for one year at the rate of 8 per cent on organization and development expense, \$325,000, equals \$26,000, making the total interest expense \$217,153.

Administrative, legal, and miscellaneous expense during construction is figured at $2\frac{1}{2}$ per cent of the value of equipment at plant, omissions and contingencies, buildings and appurtenances, mains and engineering, general contractors' expense and profit, all of which amounts to \$3,822,278.31, equalling \$95,556.95." P.U.R.1923B.

Spurr—"Guiding Principles of Public Service Regulation," Vol. 1, Chapter 16.

For the purpose of getting a reproduction cost new less depreciation value, I have used as a basis the inventory and appraisal prepared by Mr. Smith, as set out in Smith Exhibits Nos. 1 and 2, but have used Smith Exhibit No. 18 to get at the reproduction cost new of the property less engineering, field supervision, miscellaneous field expense and all overheads, and from these amounts I have made certain deductions, such as depreciation, and have added thereto the allowance for overheads, engineering, field supervision and miscellaneous field expense.

The following is a summary of the value of the property worked out on the before-mentioned basis:

<i>Leaseholds.</i>	
Horner value of leaseholds	\$563,250.00
<i>Well Group.</i>	
1. Reproduction cost new of gas well construction less engineering, field supervision, and miscellaneous field cost and all overheads	\$732,114.00
7 per cent of above amount for engineering, field supervision and miscellaneous field cost	51,247.00
Total	\$783,361.00
1.5 per cent of above amount for omissions and contingencies	11,740.00
7 per cent for general cost	54,835.00
6 per cent for corporate cost	47,002.00
Total cost new	\$896,938.00
43.57 per cent for depreciation (Smith)	390,895.00
Total cost new less depreciation	\$506,043.00
2. Reproduction cost new of gas well equipment less engineering, field supervision, and miscellaneous field cost and all overheads	\$354,861.00
7 per cent of above amount for engineering, field supervision and miscellaneous field cost	24,840.00
Total	\$379,701.00
1.5 per cent of above amount for omission and contingency ..	5,698.00
7 per cent for general cost	26,579.00
6 per cent for corporate cost	22,782.00
Total cost new	\$434,760.00
43.57 per cent depreciation (Smith)	189,424.00
Total cost new less depreciation	\$245,336.00

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3. Cost new of drilling and cleaning equipment (no engineering, field supervision and field miscellaneous included) less all overheads	\$9,454.00
1.5 per cent for omission and contingency	141.00
7 per cent for general cost	661.00
6 per cent for corporate cost	567.00
Total cost new	<u>\$10,823.00</u>
48.77 per cent depreciation (Smith)	5,278.00
Total cost new less depreciation	<u>\$5,545.00</u>

*Final Summary of Well Group.**Reproduction Cost New Less Depreciation on Above Basis*

Gas well construction	\$506,043.00
Gas well equipment	245,336.00
Drilling and cleaning equipment	5,545.00
	<u>\$756,924.00</u>

Mr. Horner fixes the value of the Well Group at \$633,250.

In considering the property contained in Smith Exhibit No. 2, being all the physical property other than leaseholds and property contained in Smith Exhibit No. 1, I have considered first: Field Line Construction and Equipment; second: Transmission Line Equipment; third: Distribution Line Equipment; and then the balance of the property contained in Smith Exhibit No. 2.

I have considered Field Line Construction and Equipment, Transmission Line Equipment and Distribution Line Equipment separate from other property included in Smith Exhibit No. 2, as these items are of large amounts and the principal contention in the case was over the depreciation of this class of property.

1. Cost new of field line construction and equipment, less engineering, field supervision, miscellaneous field cost and all overheads	\$842,292.00
7 per cent of above amount for engineering, field supervision and miscellaneous field cost	58,960.00
	<u>\$901,252.00</u>
1.5 per cent of above for omission and contingency	13,519.00
7 per cent for general cost	63,087.00
6 per cent for corporate cost	54,075.00
Total cost new	<u>\$1,031,933.00</u>
25 per cent depreciation	257,983.00
Cost new less depreciation	<u>\$773,950.00</u>

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2. Cost new of transmission line equipment less engineering, field supervision, and miscellaneous field cost and all overheads	\$2,624,572.00
7 per cent of above amount for engineering, field supervision, and miscellaneous field cost	183,720.00
Total	\$2,808,292.00
1.5 per cent of above amount for omission and contingency	42,124.00
7 per cent for general cost	196,580.00
6 per cent for corporate cost	168,497.00
Total cost new	\$3,215,493.00
25 per cent depreciation	803,873.00
Cost new less depreciation	\$2,411,620.00
3. Cost new of distribution line equipment less engineering, field supervision, and miscellaneous field cost	\$989,388.00
7 per cent of above amount for engineering, field supervision and miscellaneous field cost	69,257.00
Total	\$1,058,645.00
1.5 per cent of above for omission and contingency	15,879.00
7 per cent for general cost	74,105.00
6 per cent for corporate cost	63,518.00
Total cost new	\$1,212,147.00
35 per cent depreciation	424,251.00
Cost new less depreciation	\$787,896.00
4. Cost new of property contained in Smith Exhibit No. 2, exclusive of transmission line equipment, distribution line equipment, and field line construction and equipment, less engineering, field supervision, miscellaneous field cost, and less all overheads	\$1,460,255.00
7 per cent of above amount for engineering, field supervision, and miscellaneous field cost	102,217.00
Total	\$1,562,472.00
1.5 per cent for omission and contingency	23,436.00
7 per cent for general cost	109,372.00
6 per cent for corporate cost	93,748.00
Total cost new	\$1,789,028.00
15 per cent depreciation	268,354.00
Cost new less depreciation	\$1,520,674.00

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General Summary.

Value of leaseholds (Horner)	\$563,250.00
Value of well group, less depreciation, Smith Exhibit No. 1 ..	756,924.00
Value of transmission line equipment new, (25 per cent depreciation), (Smith Exhibit No. 2)	2,411,620.00
Value of field line construction and equipment (25 per cent depreciation), (Smith Exhibit No. 2)	773,950.00
Value of distribution line equipment (35 per cent depreciation), (Smith Exhibit No. 2)	787,986.00
Value of physical property other than above (15 per cent depreciation), (Smith Exhibit No. 2)	1,520,674.00
Value of physical property	\$6,814,404.00
Working capital	203,162.00
	<hr/>
Going concern value (8 per cent of above)	\$7,017,566.00
	561,405.00
Fair value of property	<hr/>
	\$7,578,971.00

If we accept Mr. Horner's value of the well group, then the value, exclusive of working capital and going concern value, would be \$6,690,730.

If we deduct from the value of the physical property \$300,000 on account of duplicate pipe lines, then the value of working capital and going concern value would be \$6,514,404.

If we depreciate all the property in Smith Exhibit No. 2 other than transmission line equipment, distribution line equipment and field line construction and equipment 20 per cent instead of 15 per cent, the value of the property, not including working capital and going concern value, would be \$6,724,953.

If we accept Mr. Horner's value of wells, amounting to \$633,250 instead of that herein set out, deduct \$300,000 on account of duplicate pipe lines and depreciate all property in Smith Exhibit No. 2, 20 per cent, other than transmission line equipment, distribution line equipment and field line construction and equipment, the value would be, exclusive of working capital and going concern value, \$6,301,279.

If we depreciate field line construction and equipment 40 per cent instead of 25 per cent, and distribution line equipment 40 per cent instead of 35 per cent, this would reduce the valuation \$215,404, and, with the other deductions last above mentioned, would leave the value of the property, exclusive of going concern value and working capital, \$6,085,875.

If we further deduct from the physical property 10 per cent thereof, say on account of high unit cost used by Mr. Smith, P.U.R.1928B.

we would still have a value of \$5,401,329, exclusive of working capital and going concern value. If we add to \$5,401,329, \$203,162 for working capital, and 8 per cent of these amounts for going concern value, we would have a value of \$6,052,850.

I do not see how it can be contended that the fair value of the property is not in excess of \$6,000,000. In my opinion the fair value is much in excess of this amount.

Allocation of Property between States—Leaseholds

Mr. Smith, in his Exhibit No. 1, allocated the value of the leaseholds as between the States of Maryland and West Virginia. He allocated to West Virginia 56.6 per cent of the total value, and to Maryland 43.4 per cent. This allocation is based on the estimated sales in the two states for the year 1927. Using these percentages, the value of the leaseholds would be allocated as follows:

Maryland	\$244,451.00
West Virginia	318,799.00

Mr. Covell, a witness in behalf of the applicant, in his Exhibit No. 1, allocates as between the states the well group property, or the property contained in Smith Exhibit No. 1, and of this property he allocates to West Virginia 56.6 per cent and to Maryland 43.4 per cent. This percentage is in proportion to the estimated cubic feet of sales in the year 1927.

Using these percentages, the well group property would be allocated as follows:

Maryland	\$313,467.00
West Virginia	443,457.00

Mr. Covell, in his Exhibit No. 2, allocates as between the states the property given in Smith Exhibit No. 2, or all the tangible property other than "Leaseholds" and "Well Group." For the distribution system he allocates 50.30 per cent to West Virginia and 49.70 per cent to Maryland. For the transmission group he allocates 44.5 per cent to West Virginia and 55.5 per cent to Maryland. For the general group he allocates 48.4 per cent to West Virginia and 51.6 per cent to Maryland. For these three groups of property the average per cent which he allocates as between the states is as follows:

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Maryland	52.3%
West Virginia	47.7%

The value of this property is \$5,494,239. Applying these percentages to this property it would be allocated as follows:

Maryland	\$2,873,487.00
West Virginia	2,620,752.00

I think we should apportion working capital and going concern value on the same basis, and using the average per cent given above, we would have:

Maryland	\$399,869.00
West Virginia	364,698.00

Summary of Amounts Apportioned to States

	<i>West Virginia.</i>	<i>Maryland.</i>
Leaseholds	\$318,799.00	\$244,451.00
Well group, Smith Exhibit No. 1	443,457.00	313,467.00
Property in Smith Exhibit No. 2	2,620,752.00	2,873,487.00
Working capital and going concern value ...	364,698.00	399,869.00
	<u>\$3,747,706.00</u>	<u>\$3,831,274.00</u>

In connection with the allocation of property and expense between the two states, it may be well to note here the following facts:

The rates in Maryland are materially higher than in West Virginia.

In Case No. 1461, 11 Ann. Rep. W. Va. P. S. C. 139, P.U.R. 1924E, 24, the Commission noted in its report that in 1922 there were 11,535 consumers in West Virginia who used 1,400,696,000 cubic feet of gas, from which a revenue of \$422,850 was received, and in Maryland there were 10,826 consumers, who used a total of 565,000,000 cubic feet of gas, and the revenue received from these consumers amounted to \$411,970.

The evidence in this case shows that in 1926 there were 12,008 consumers in West Virginia, who consumed 1,035,069 M. cubic feet of gas, for which they paid \$547,231.76; in Maryland, for the same year, there were 12,670 consumers who used 747,662 M. cubic feet of gas, for which they paid \$523,312.56.

Operating Expenses and Revenues

Mr. Jirgal gives the revenue for the year 1925 as \$1,034,496.31. Mr. Jirgal included in his earnings one-half of the P.U.R.1928B.

gasoline earnings, amounting to \$18,829. If the total earnings received from gasoline are included, then the gross earnings would be \$1,053,325.

Mr. Williamson finds the gross revenue to be \$1,053,325.

I do not think there is any justification for deducting from the gross revenue one-half of the net earnings from gasoline. For the purpose of my analysis I have taken \$1,053,325 as the gross revenue for the year 1925.

Mr. Jirgal reports (Exhibit No. 2, page 2) that according to the books of the company, the operating expenses and taxes for the year 1925 were \$734,605, and the net earnings, before making any allowance for depreciation and depletion, were \$318,720. Mr. Jirgal adjusts the operating expense in the following particulars:

1. He adds to operating expense \$26,716 to take care of rate case expense, which totals approximately \$100,000. There is already charged in expense for this purpose \$6,617.17, which amount added to \$26,716 would give \$33,000 for rate expense, or an allowance sufficient to amortize this expense in three years.

2. Mr. Jirgal deducts from operating expense \$17,706 on account of reduction of management fee from 4 per cent to 3 per cent. As adjusted by Mr. Jirgal, the operating expense for the year 1925 would be \$743,615.

Mr. Williamson does not make any adjustment in his report of revenue and expense for the year 1925.

Mr. Williamson has filed a report giving income and expense for the year 1926, which report shows that the income for the year was \$1,106,091.42; expense \$798,606.56; net income available for return and depreciation \$307,484.86.

I think the operating expense should be adjusted as follows:

An item of \$10,000 should be eliminated from transmission maintenance account as it appears the company during 1926 made an extraordinary effort to repair its gas lines. This is in the nature of deferred maintenance and should have been done prior to 1926. It has no bearing, strictly speaking, on the expenses of 1926 and will probably not be as much in 1927.

An item of \$3,000 for rent and salary, it is estimated, should be charged to the appliance company. The company contends P.U.R.1928B.

the appliance company is, in effect, the advertising and new-business department of the company and that the loss or gain of this company should be borne by the gas company. It may be true that the sale of stoves and appliances aid in the sale of gas, but it would seem—since the actual fact is that this company is a separate corporation, having its own office force—that the *facts* should be considered rather than the *ifs*. It will also be noted, in this connection, that during 1926 the company spent \$4,200, approximately, in advertising and soliciting new business, which was not incurred in 1925. It would appear, therefore, in speaking of the activities of the appliance company, the gas company is forced to augment its advertising with funds from that company. It is my belief the entire management fee of \$45,866.24 is not justified as an operating expense. It may be that this amount of money is a well-deserved expenditure from a financial management standpoint, but from an operating standpoint, it is believed it should not be considered in addition to the regular general expenses, as there is very little evidence of a direct benefit from an operating viewpoint. There is probably some element of service to the company in the way of operation, as this includes an annual audit and certain other office service, but \$5,000 would cover this class of service.

It also is believed, where a company is permitted to request deposits from its consumers and has the right to suspend service for nonpayment of bills, that a very small amount for bad debts should be allowed. This company has accrued in two years the sum of \$10,237.81, and against that amount has actually charged the sum of \$1.02, indicating for the 2-year period the sum of \$10,237.81, while only one-half of 1 per cent of the gross, is far too much for the purpose. It would seem that a nominal allowance of about \$500 a year should cover this contingency. This is also suggested as the company maintains division offices, collectors, and a very up-to-date method of collection. It would seem if this company should lose this amount of money, with its facilities for collecting bills and its required deposits, it would be carelessness and should not be charged against the consumer.

To establish a fair rate it is believed the item of rate case P.U.R.1928B.

expense should be included, and if this amount is amortized on a 5-year basis, the expenses of the company should be increased for this item \$5,845.43.

During 1926 the company paid \$13,354.22 for 1925 income taxes. The income tax for 1926 will be nothing, as estimated by the company, but, as has been the past practice of this Commission, it would seem, in considering the above adjustments, that there should be allowed for income taxes approximately the sum of \$10,000. A summary of the above adjustments follows:

Net operating income	\$307,484.86
Add:	
Maintenance adjustment	\$10,000.00
Appliance Company	3,000.00
(1) Management fee adjustment	40,866.24
(2) Bad debt adjustment	4,767.48
	<hr/>
	58,633.72
	<hr/>
	\$366,118.58
Add:	
Rate case adjustment	\$5,845.00
Income tax adjustment	10,000.00
	<hr/>
	15,845.43
	<hr/>
	\$350,273.15

With this adjustment it will be noted the income for the year 1926 was \$1,106,091.42; operating expenses for the year 1926 were \$757,818; and net operating income was \$350,273.15. For the purposes of this case I have used Mr. Williamson's statement of income and expenses for the year 1926 as adjusted above:

Revenue and Expenses.

Apportioned between Maryland and West Virginia.

	<i>West Virginia.</i>	<i>Maryland.</i>
Income	50.38%	49.62%
Expenses	53.86%	46.14%

The income is based on the actual income from each state, except gasoline, which is apportioned on the basis of gas used in each state. Expense is apportioned on the basis of assigning general and general administrative expense to production, transmission, and distribution on a *pro rata* basis, then production expense was divided between states on the basis of gas used; transmission expense on the cubic foot-mile basis; and distribution on the actual expense in each state. Taxes are apportioned on the P.U.R.1928B.

property basis. Using the per cent given above, the revenue and expense would be apportioned between Maryland and West Virginia as follows:

	<i>West Virginia.</i>	<i>Maryland.</i>
Income	\$557,248.85	\$548,842.25
Expense	408,160.77	349,658.00

Allowance for Depreciation and Depletion

This Commission has uniformly held that the allowance for depreciation and depletion is for the purpose of retiring the total investment in the plant at the end of the life thereof. That is, if a gas plant has a life of twenty years, it is contemplated an allowance will be made so that a reserve will be built up with the idea that at the end of the life of the plant the total investment will have been returned to the investors less the salvage value of the property. Numerous methods of computing this allowance have been advanced, but as a rule this Commission has taken the estimated years of life of the gas field and allowed enough annually so that with the exhaustion of the gas the company will have received enough to retire the investment.

Mr. Jirgal, in Table 3 of Exhibit No. 1, gives us the investment in the applicant's property by years from December 31, 1899, to December 31, 1925, both inclusive; in Table 4 he gives the net earnings for each year after allowing $5\frac{1}{2}$ per cent of the book cost for depreciation and depletion. Mr. Jirgal's calculations are based entirely upon the book cost and no attempt is made to reflect the fair value of the property, and nothing is included for working capital and going concern value.

It will be noted from this table the net earnings before allowance for depreciation and depletion are \$8,606,694.29. At the rate of $5\frac{1}{2}$ per cent of the book cost, the total accumulation for depreciation and depletion is \$3,953,425 and there remains \$4,653,269 as the total amount available for return during the life of the property, which is \$1,269,679 short of allowing 8 per cent on the book cost and working capital.

In the first column of Table 5 Mr. Jirgal has included in the book cost for each year 3 per cent thereof for working capital. In the second column he shows what the return would be if

the revenue was sufficient to give an 8 per cent return on the book cost plus 3 per cent thereof for working capital. There further appears in Column 4 of this exhibit the amount available for return after allowing $5\frac{1}{2}$ per cent for depreciation and depletion, and in the next column the amount of deficit each year.

In the following table I have set out in the second column the book cost, or actual investment, for the years indicated. For the purpose of this analysis, I have adopted for the rate base for the years 1899 to 1917, inclusive, the actual investment, which does not include any allowance for working capital or going concern value. For the rate base for the years 1918 to 1925, inclusive, I have taken the actual investment for each of these years and added thereto \$1,400,000 to reflect to a degree the present fair value, including working capital and going concern value but less depreciation. Nothing is included for working capital or going concern value up to 1918. In the rate base thus established, I found the amount of an 8 per cent return thereon, and this is set out in the fourth column. In the next column, under the heading "Net Return," I give the amount of net revenue for each year as found by the statistician for the Commission. From the net revenue I have deducted for each year the amount of an 8 per cent return on the rate base used, which gives us the balance that could be applied to depreciation and depletion, or retirement of the investment. This amount appears in the last column. The figures in italics show the amount of the deficit:

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Year.	Investment.	Investment Plus 30%	8% Return.	Net Revenue.	Applicable for Deprecia- tion and De- pletion or Deficit.
1899 ...	\$41,687.00	.....	\$3,334.96	\$34.00	\$3,368.00
1900 ...	64,541.00	.....	5,163.28	2,954.00	2,209.00
1901 ...	66,878.00	.....	5,350.24	9,246.00	3,896.00
1902 ...	67,152.00	.....	5,372.16	7,152.00	1,780.00
1903 ...	300,439.00	.....	24,035.12	12,653.00	11,382.00
1904 ...	439,436.00	.....	35,154.88	7,375.00	27,779.00
1905 ...	511,501.00	.....	40,920.08	86,685.00	45,765.00
1906 ...	1,414,316.00	.....	113,145.28	119,176.00	6,031.00
1907 ...	2,028,601.00	.....	162,288.08	192,807.00	30,519.00
1908 ...	2,103,568.00	.....	168,285.44	258,035.00	89,747.00
1909 ...	2,410,839.00	.....	192,867.12	398,137.00	205,270.00
1910 ...	2,564,759.00	.....	205,180.72	467,109.00	261,929.00
1911 ...	3,222,677.00	.....	257,814.16	500,777.00	242,963.00
1912 ...	3,406,378.00	.....	272,610.24	586,950.00	314,440.00
1913 ...	3,605,223.00	.....	288,417.84	616,093.00	327,676.00
1914 ...	3,872,108.00	.....	309,768.64	573,910.00	264,142.00
1915 ...	3,936,796.00	.....	314,951.88	569,609.00	254,658.00
1916 ...	4,113,014.00	.....	329,041.12	439,973.00	110,932.00
1917 ...	4,226,223.00	.....	338,097.00	134,055.00	204,042.00
1918 ...	4,280,132.00	5,680,132.00	454,410.00	392,799.00	61,611.00
1919 ...	4,329,691.00	5,729,691.00	458,375.00	266,377.00	191,998.00
1920 ...	4,346,938.00	5,746,938.00	459,755.00	161,149.00	298,606.00
1921 ...	4,447,749.00	5,847,749.00	467,819.00	230,941.00	236,878.00
1922 ...	4,506,864.00	5,906,864.00	472,549.00	538,024.00	65,475.00
1923 ...	4,591,308.00	5,991,308.00	479,304.00	290,963.00	188,341.00
1924 ...	4,644,989.00	6,044,989.00	483,599.00	251,257.00	232,342.00
1925 ...	4,714,928.00	6,114,928.00	489,194.00	354,249.00	134,945.00

From the foregoing table it appears the total amount the company earned above an 8 per cent return amounted to \$2,225,223, but it also appears that for twelve of the years of the operation there was earned less than the 8 per cent return, and the total of this amounted to \$1,593,501. If we subtract this amount from the total earned above an 8 per cent return during fifteen years of the life of the plant, there remains \$631,722—the amount earned during the life of the plant above 8 per cent on the rate base indicated above. However, to give the net amount applicable to depreciation and depletion, or return of the investment, there should be deducted an amount for property retired during the life of the plant. Mr. Williamson shows at page 27 of his report that property to the amount of \$671,013 was retired during the life of the plant.

When one considers the amount of the retirements which have been deducted from the investment and the same amount deducted from the depreciation and depletion reserve, it is evident the company has nothing in the reserve to retire the investment. P.U.R. 1928B.

If we allow an 8 per cent return on the book cost of the property, and, not allowing anything for working capital or going concern value, then the amount above an 8 per cent return on the actual investment for each year that could be applied to the reserve for retirement of the investment would be \$1,791,764. However, if we deduct the retirements during the life of the plant, amounting to \$671,764, then the balance in the reserve would amount to \$1,120,000. Of course, such a reserve could only be accrued by allowing an 8 per cent return on a value far less than the fair value of the property.

As shown by Mr. Williamson's report at page 27, the company set up on its books as reserve for depreciation and depletion \$1,244,424, but did not deduct the retirements. If these retirements, amounting to \$671,013, are deducted, then there would remain in the reserve, as shown by the books, \$573,411. Using the company's books as a basis, if we deduct from the book cost of the property \$573,411, the balance in the reserve, then there would remain to be retired property, the book cost of which is \$4,141,517, and an allowance must be made to retire property of this value.

If we give the property a life of eighteen years (the evidence shows it has a life of fifteen to twenty years), then we should allow \$230,084 per year to retire the unamortized investment within eighteen years. This amount is approximately $5\frac{1}{2}$ per cent of \$4,141,517, the unamortized part of the investment as I have figured it above. The applicant contends it is entitled to an allowance of \$310,000 per year for depreciation and depletion.

Much has been said about the property of this company being used in connection with the manufacture and distribution of artificial gas. However, today it is a natural gas plant and we must look on it as such. If part of the property of this company can be used in connection with the manufacture and distribution of artificial gas—but we have no way of knowing what value, if any, should be put upon it for this purpose—and, in view of the small amount accumulated in the reserve at the present time, I think the allowance above suggested is certainly not too much.

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I think \$230,184 per year should be apportioned to the states in the proportion assumed by them of the total expense. This would give to West Virginia \$124,982 or 54.33 per cent; and to Maryland \$105,061 or 45.67 per cent.

The amount assigned to West Virginia is approximately 3 $\frac{3}{4}$ per cent of the rate base of \$3,747,715. If we assign to West Virginia a rate base of only \$2,500,000, then the amount allowed herein for depreciation and depletion would be approximately 5 per cent of the rate base.

At pages 111 to 114 of the brief filed on behalf of the gas company, a number of cases are cited for the purpose of showing the amounts allowed in those cases to a gas company for depreciation.

In the recent case of MacThwaite Oil & Gas Co. v. Ada (Okla.) P.U.R.1927D, 833, the Commission allowed to a natural gas company 5 per cent for depreciation.

As to the method of determining the amount to be allowed for depreciation and depletion, see Re United Fuel Gas Co. (W. Va.) P.U.R.1918C, 193; Clarksburg Light & Heat Co. v. Public Service Commission, 84 W. Va. 638, 649 et seq., P.U.R. 1920A, 639, 100 S. E. 551.

Final Summary.

Covering All Property and Business.

Fair value of property		\$7,578,971.00
8 per cent of above amount for return	\$606,318.00	
Operating expenses, 1926	757,818.00	
Depreciation and depletion	230,043.00	
Revenue needed	\$1,594,179.00	
Revenue received in 1926	1,106,091.00	
Additional revenue needed	\$488,088.00	

Final Summary.

Covering All Property and Business in West Virginia.

Fair value of West Virginia property, December 31, 1925	\$3,747,706.00
8 per cent return on above amount	\$299,817.00
Allowance for depreciation and depletion	124,982.00
Operating expense, 1926	408,160.00
Revenue needed	\$832,959.00
Revenue received in 1926	\$557,248.00
Additional revenue needed	\$275,711.00

I do not believe the evidence justifies such a high depreciation of transmission line and distribution line equipment, and P.U.R.1928B.

field line equipment and construction, but even allowing the depreciation herein provided for, a value is shown which justifies the rates applied for.

The amount of gas consumed in West Virginia is approximately \$1,011,000 M. cubic feet per year, and to get the additional revenue needed, the present rates (except for street lighting) should be increased over 26 cents per M. cubic feet—the amount the applicant asks.

On Rehearing.

[38] This case came on again to be heard this 23d day of December, 1927, upon the testimony taken December 12, 1927, upon the rehearing, therefore, ordered; upon the petition of the respondent for reargument of the matters contained in the record and proceedings herein, filed December 5, 1927; and upon the reply of protestants, city of Elkins and others, to said petition for reargument and the motion of said protestants to put into effect the rates fixed by an order made herein October 26, 1927, and to require the respondent gas company to remit to its consumers the difference between the rates so fixed and the rates in effect, upon the meter readings in the month of November, 1927, which said reply and motion was filed December 12, 1927.

Upon consideration of said motion, the Commission is of opinion and finds that it does not have authority to require reparation or the payment of damages, and the said motion of the protestants to require the respondent gas company to pay reparation herein is, therefore, denied.

And, upon consideration of the petition of the respondent for reargument in this case, the Commission is of opinion to and doth deny said petition, with leave to file with the record a supplemental report on said matters and things involved in the petitions for reargument and rehearing in this case.

And, upon consideration of the said evidence taken upon the rehearing aforesaid, it appears that the rates prescribed by the Commission in its order of October 26, 1927, [printed herewith], will not produce the revenue to which the respondent has been found to be entitled as set out in the report of the Commission filed herein, but that said rates will produce a probable P.U.R.1928B.

increase of \$44,323 per annum in the said revenue. And it further appears that by adding 2 cents per thousand cubic feet to each of the rates so prescribed the annual gross revenue of the respondent will be increased the additional sum of \$20,487, resulting in a total increase of \$65,810 over the revenue derived in this state from the rates in effect at the institution of this case.

And, it appearing that the probable future income of the respondent from gasoline will not be as great as it was in 1926, the Commission is of opinion the said increase in its annual revenue of \$65,810 is justified, there being included in said sum of \$65,810 the sum of \$6,624 on account of such probable decrease in annual revenue from gasoline, estimating the future annual revenue from this source at \$12,290.64.

It is, therefore, considered and *ordered* by the Commission that the rates for furnishing natural gas within the state of West Virginia prescribed by the order made October 26, 1927, be, and the same hereby are, amended and modified by adding to each and every of said rates the sum of 2 cents per thousand cubic feet, and that said rates as so amended and modified be put into effect for all gas delivered since the meter readings for the month of November, 1927.

And it is *further ordered* that the respondent, Cumberland & Allegheny Gas Company, has leave to publish the rates hereinabove prescribed plus 2 cents per thousand cubic feet, with a discount of that amount for prompt payment, or to publish the said rates net, with a penalty of two cents per thousand cubic feet if not paid within the customary period, as it may elect.
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GEORGIA SUPREME COURT.

GEORGIA PUBLIC SERVICE COMMISSION et al.
v.
ATLANTA & WEST POINT RAILROAD COMPANY.

[No. 5651.]

(— Ga. —, 139 S. E. 725.)

Rates — Powers of Commission — Statutory provision — Railroad.

1. Under the act creating the Railroad Commission of Georgia (Acts 1878-79, p. 125; Civil Code 1910, §§ 2630, 2631), now the Georgia Public Service Commission (Acts 1922, p. 143; Park's Code Supp. 1926; and Michie's Georgia Code 1926, § 2670 [a] et seq.), the Commission has the power to determine what are just and reasonable rates and charges for transportation of passengers on each of the railroads doing business in this state, p. 140.

Rates — Presumption of reasonableness — Intrastate railroad.

2. Maximum intrastate passenger rates were fixed by the Railroad Commission of Georgia, effective since September 1, 1920, at 3.6 cents per mile on railroads doing business in this state. This rate is prima facie reasonable and just, p. 141.

Constitutional law — Due process — Voluntary commutation service — Railroads.

3. State regulation through a Public Service Commission, requiring a carrier to maintain commutation service between points within the state, and fixing rates therefor which are less than the intrastate rate lawfully established for one-way intrastate travel in general, does not deprive the carrier of due process of law when the service so regulated was established by the carrier voluntarily and the rates fixed by the state are reasonable, p. 142.

Constitutional law — Due process — Rates below cost — Railroad commutation.

4. But where the Railroad Commission of this state established commutation rates between points on the line of railroad of a carrier in this state, and not between the points where commutation rates were already voluntarily established by the carrier, and the carrier was required to "establish commutation passenger fares," between certain points "at a rate not higher per mile per passenger than commutation rates now in effect between" the points originally named by the carrier, and where, on the trial of a cause seeking to enjoin the enforcement of the order of the Commission on the ground that such rates deprived the carrier of due process of law and the equal protection of the laws, the undisputed evidence for the plaintiff showed that the rates were below the cost of transportation and were unremunerative, the trial court did not err in granting a permanent injunction against the enforcement of the order of the Commission. Such rates deprived the carrier of due process of law and the equal protection of the laws, p. 142.

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Rates — Railroads — Commutation charge — Local condition — General rates.

5. Where a railroad corporation voluntarily establishes commutation rates, less than the intrastate mileage rates fixed by the State Commission, between a large city at one terminus of its line and a suburban town near such city, the establishment of such commutation rates on account of local conditions cannot be held to be the establishment of a "general policy" to put in commutation rates between all the towns on the line of such railroad where conditions are different, p. 149.

(RUSSELL, C. J., and ATKINSON, J., dissent in part.)

[September 21, 1927.]

Headnotes by the COURT.

APPEAL from judgment of lower court granting petition against Public Service Commission; affirmed.

Appearances: W. E. Watkins, of Jackson, and H. A. Hall, of Newnan, for plaintiffs in error; Dorsey, Howell & Heyman, of Atlanta, for defendant in error.

Hill, J.: In the year 1922 certain citizens of Newnan, Georgia, filed a petition with the Georgia Railroad Commission, since being changed to the Georgia Public Service Commission (Acts 1922, p. 143), to require the Atlanta & West Point Railroad Company to establish commutation rates or fares between the cities of Atlanta and Newnan, Georgia, and intermediate points. After a hearing on the application the Commission passed the following order:

"Upon consideration of the record in the above-stated case, and of the evidence, and argument submitted at the hearing had thereon, it is ordered that, effective on and after August 1, 1922, and until the further order of the Commission, the Atlanta & West Point Railroad Company shall establish commutation passenger fares between Atlanta and Newnan, Georgia, and between Atlanta and intermediate stations between Palmetto and Newnan, at a rate not higher per mile per passenger than commutation rates now in effect between Atlanta and Palmetto, Georgia; it is ordered, further, that tickets or books of commutation fares provided for in this order shall be under the same conditions and carry the same privileges as now in effect between Atlanta and Palmetto, Georgia."

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Thereupon the Atlanta & West Point Railroad Company filed its equitable petition in the superior court of Fulton county against the Railroad Commission of Georgia and the individual members composing the Commission, alleging that the order was invalid, null, and void, for various reasons set forth in the petition, and that the order, if enforced, would have the effect of depriving the plaintiff of its property without due process of law and of the equal protection of the law, as guaranteed both by the Constitution of the United States (amendment 14) and by the Constitution of the state of Georgia (article 1, § 1, par. 3), and praying that the order be vacated and set aside, and that the Railroad Commission of Georgia and each of its members, its attorney, and all others acting under it be enjoined from making any effort or doing any act seeking to enforce the order, and that a perpetual injunction be granted against taking any step or action to compel plaintiff to carry out the regulations of said order.

The petition alleged, in substance, the following: The plaintiff operates a railroad from Atlanta to West Point, Georgia; that the cities of West Point, La Grange, and Newnan are junction points with other railroads; both La Grange and Newnan are large manufacturing points and conduct extensive mercantile businesses, wholesale and retail. The maximum charge for carrying passengers on plaintiff's railroad, as established by the Railroad Commission of Georgia, which had been in effect since August, 1920, was 3.6 cents per mile; and plaintiff had been charging this rate, except that it did issue commutation tickets at points between Palmetto and Atlanta for a much lower rate, which rate plaintiff had continued to the time of filing this petition. The circumstances under which this rate were originally put in effect are set forth. The sale of the commutation books has been attended with considerable loss to the plaintiff. It had operated a special accommodation train between Palmetto and Atlanta, but its operation was attended with such loss that it was discontinued. For a time the train was operated between College Park and Atlanta, but the loss from this operation had compelled its discontinuance. Certain persons engaged in business in Atlanta, on the faith of the fact that such special train

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would be continued, and on account of the commutation rates, had made Palmetto and other points between that town and Atlanta their homes; and plaintiff was, therefore, permitted, in the exercise of good faith, to continue the sale of commutation books. These commutation rates have resulted in a heavy loss to plaintiff, the extent of which is alleged. Various grounds are alleged as to why the order of the Commission was invalid. On the hearing the evidence for the plaintiff consisted of affidavits of W. H. Smith, formerly its comptroller, Charles A. Wickersham, its president and general manager, W. H. Vincent, its present comptroller, and J. A. Higgins, its assistant general passenger agent. Affidavits were offered in evidence by the Georgia Public Service Commission, of George J. Martin, F. D. Cole, E. M. Cole, R. O. Jones, and R. H. North, who testified, in effect, that if commutation rates were put into effect between Newnan and Atlanta, certain residents of Newnan would avail themselves of such commutation rates, and that the number would probably increase. The evidence on behalf of the plaintiff was substantially in support of the petition, in effect showing that there was no necessity for the commutation rates between Newnan and Atlanta such as existed in large cities like New York and Chicago, where there is a great suburban population doing business in the cities, and which justifies the operation of special trains for their accommodation. The evidence of W. H. Vincent tended to show that it cost the plaintiff 2.81 cents per mile, that the revenue per passenger mile on commutation fares for the average of four years was .99 of 1 cent, and that the actual loss per mile of carrying each passenger who might ride on a commutation ticket was 1.83 cents. Certain tables attached to the affidavit of W. H. Vincent tended to show that Newnan is almost half way between Atlanta and West Point, and that the intrastate passengers carried between Atlanta and Newnan and intermediate points comprise about 50 per cent of all the intrastate passengers carried, and about 40 per cent of the revenue received from intrastate passengers. We quote part of the affidavit of W. H. Vincent, as follows:

"To permit the sale of commutation tickets between Atlanta and Newnan would probably cause the railroad company to haul
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50 per cent of its passengers at a heavy loss. . . . Since this order of the Georgia Public Service Commission there has been constructed between Atlanta and Newnan a concrete public highway. A great many people use this highway for travel between Atlanta and Newnan, instead of using train service. . . . Conditions with reference to the necessity for railroad transportation of the population in large cities, in order to avoid their living in congested districts, have greatly changed. A number of years ago, before the general use of automobiles and electric street car service, it was necessary for people who wished to do business in a large city, and not live within the thickly settled sections of the cities, to locate along the railroads entering such city. As a result of this, there was quite a demand for a specially cheap rate for the people who worked in the city and lived in the outlying towns and suburbs of the city. In recent years this necessity has been practically eliminated, especially in cities like Atlanta, where there is ample space all around the city for the settlement of people in homes in sections not closely built up. This change has been caused by the building of electric trolley lines enabling people to live a few miles from the center of the city and to reach their homes by trolley or electric service, by great improvements in the roads, and the use of automobiles in going to and from their homes to and from their places of business, the use of electric car lines operating regular schedules between outlying districts and the center of the city. Because of these facilities that enable suburbanites to reach their places of business, the city of Atlanta has extended in every direction, and particularly in those sections not served by railroads. One of the reasons for this last situation is the fact that where you find railroads you find industrial development, and the erection of industries has a tendency to retard the use of such sections for residential purposes."

The court granted the injunction as prayed for, and the defendants excepted.

[1] The question to be determined is whether the order of the Railroad Commission of Georgia, now the Georgia Public Service Commission (Acts 1922, p. 143), as set out in the foregoing statement, is invalid for any reason suggested under the plead-P.U.R.1938B.

ings and evidence. "The power to determine what are just and reasonable rates and charges is vested exclusively in said Commission; and the Commissioners shall make reasonable and just rates of freight and passenger tariffs, to be observed by all railroad companies doing business in this state, on the railroads thereof," etc. Civil Code 1910, § 2630. Section 2631 provides that:

"The [Public Service] Commissioners are required to make for each of the railroad corporations doing business in this state, as soon as practicable, a schedule of just and reasonable rates of charges for transportation of passengers and freights and cars on each of said railroads," etc.

[2] The question arises, What are reasonable and just passenger rates on intrastate commerce within the state of Georgia? Under the Transportation Act of 1920 (U. S. Comp. St. § 10071 $\frac{1}{4}$ et seq.), the Interstate Commerce Commission fixed passenger rates at 3.6 cents per mile. See subject of "Increased Rates," 58 Inters. Com. Rep. 220. It may be stated in passing that an examination of this report shows that the Railroad Commissions of every state in the Union and various mercantile and industrial bureaus were represented at the hearing before the rate was so fixed. It appears that John T. Boifeuillet appeared on behalf of the Railroad Commission of Georgia, and H. T. Moore, William A. Wimbish, and W. H. Ellis appeared on behalf of the Atlanta Freight Bureau. By authority, therefore, of the Interstate Commerce Commission the rate of 3.6 cents per mile was made effective as to intrastate passenger rates. See Wisconsin Case, 59 Inters. Com. Rep. 391. This ruling was upheld in *Railroad Commission of Wisconsin v. Chicago, B. & Q. R. Co.* 257 U. S. 563, 66 L. ed. 371, P.U.R.1922C, 200, 42 Sup. Ct. Rep. 232, 22 A.L.R. 1086. The decision fixing intrastate passenger rates at 3.6 cents per mile seems to have been acquiesced in by the Railroad Commission of Georgia, and passenger rates in this state have been fixed at 3.6 cents per mile since September 1, 1920. Paragraph 2 of the defendants' answer in the present case admits certain allegations in the petition, "except that the maximum rate of 3.6 cents per mile on intrastate passenger traffic over said road did not go into effect on P.U.R.1928B.

August 25, 1920, but on September 1, 1920." It, therefore, appears that a charge of 3.6 cents a mile per passenger has been fixed as a reasonable and just rate to be charged by railroads in this state, in order to furnish carriers reasonable and just rates for carrying passengers. Common carriers are entitled to just and reasonable compensation on each class of business transported by them.

[3, 4] In *Northern P. R. Co. v. North Dakota ex rel. McCue*, 236 U. S. 585, 59 L. ed. 735, P.U.R.1915C, 277, 35 Sup. Ct. Rep. 429, L.R.A.1917F, 1148, it was held:

"The cost of the transportation of a particular commodity which must be considered when determining whether the maximum intrastate rates fixed by the state for the carriage of such commodity are adequate or confiscatory includes all the outlays which pertain to such transportation, there being no basis for distinguishing in this respect between so-called 'out-of-pocket cost,' or 'actual' expenses, and other outlays which are none the less actually made because they are applicable to all traffic, instead of being exclusively incurred in the traffic in question. . . . A state may not compel a carrier to establish a rate upon a particular commodity which is less than reasonable, in order to build up a local enterprise. . . . The maximum intrastate rates fixed by North Dakota Laws 1907, chap. 51, for the transportation of coal in carload lots, are confiscatory and deny the carrier the due process of law guaranteed by United States Constitution, 14th Amendment, where, taking into account the entire traffic to which such rates are applied, they compel the carrier to transport the commodity for less than cost, or without substantial compensation in addition to cost, although the return to the carrier from its entire intrastate operations may be adequate."

In the opinion Mr. Justice Hughes, among other things, said:

"But, broad as is the power of regulation, the state does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the P.U.R.1928B.

business according to the undertaking which the carrier has expressly or impliedly assumed. If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight. As a carrier for hire, it cannot be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection, and seek to impose upon the carrier and its property burdens that are not incident to its engagement. In such a case, it would be no answer to say that the carrier obtains from its entire intrastate business a return as to the sufficiency of which in the aggregate it is not entitled to complain." (At pp. 284, 285).

And see *Norfolk & W. R. Co. v. Conley*, 236 U. S. 605, 59 L. ed. 745, P.U.R.1915C, 293, 35 Sup. Ct. Rep. 437.

It has been held by the Supreme Court of the United States that in considering what is a fair return for the hauling of intrastate passengers a State Commission is not permitted to take into consideration the returns received by the carrier from interstate business. *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418. It has also been held that rates must be based on the fair valuation of the property devoted to public use, including the cost of construction, the value of stocks and bonds, earning capacity, and operating expenses. *Wood v. Vandalia R. Co.* 231 U. S. 1, 7, 58 L. ed. 97, 100, 34 Sup. Ct. Rep. 7; *Southern Iowa Electric Co. v. Chariton*, 255 U. S. 539, 542, 65 L. ed. 764, 775, P.U.R.1921D, 275, 41 Sup. Ct. Rep. 400; *Vandalia R. Co. v. Schnull & Co.* 255 U. S. 113, 118, 65 L. ed. 539, 543, P.U.R.1921C, 507, 41 Sup. Ct. Rep. 324; *Brooks-Scanlon Co. v. Railroad Commission*, 251 U. S. 396, 64 L. ed. 323, P.U.R.1920C, 579, 40 Sup. Ct. Rep. 183; *Smyth v. Ames*, *supra*; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565. In the *Schnull Case*, *supra*, headnote 1 is as follows:

"A state may not segregate a class of traffic and compel a carrier to transport it in intrastate commerce at less than cost, or without a substantial compensation, although the return by the carrier from its entire intrastate operations may be adequate." P.U.R.1928B.

The law creating the Georgia Public Service Commission has not in express terms conferred power upon the Commission to establish commutation rates as such. We do not mean to hold, however, that the Georgia Public Service Commission, may not, under the law, promulgate commutation rates, in a proper case, on intrastate railroads doing business in this state, provided such rates are reasonable and just. The power of the Commission in establishing rates is that conferred by the Civil Code, the sections of which are set out above, and the amendments thereto; and that authority is limited to fixing rates which are reasonable and just for the class of service to be rendered, and which will afford a reasonable return on the investment of the carrier, after paying the cost for rendering such service. The Railroad Commission of Georgia ordered the Atlanta & West Point Railroad Company, in the instant case, to render a passenger service between Newnan and Atlanta and intermediate points on a basis of return which, according to the undisputed evidence, is less than the cost of such service to the traveling public; and, therefore, we are of the opinion that the court below did not err, under the pleadings and the evidence, in enjoining the Commission from enforcing such order. We are of the opinion that the order is violative of the due process clauses of the state and Federal Constitutions, which prohibit the taking of property of a citizen without due process of law, and that it denies the carrier the equal protection of the law.

In *Pennsylvania R. Co. v. Towers*, 245 U. S. 6, 62 L. ed. 117, 38 Sup. Ct. Rep. 2, L.R.A.1918C, 475, the Supreme Court of the United States held that whether the statutes of Maryland intend to authorize the Public Service Commission to revise intrastate commutation rates when such rates have already been established by voluntary action of the railroad company, is a question of state law concerning which the conclusion of the court of appeals of Maryland binds this court upon a writ of error to review its judgment. State regulation, through a Public Service Commission, requiring a carrier to maintain commutation service between points within the state and fixing rates therefor, which are less than the intrastate rate lawfully established for one way intrastate travel in general, does not deprive the carrier

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of due process of law when the service so regulated was established by the carrier voluntarily and the rates fixed by the state are reasonable. *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565, is distinguished, and the views expressed in that case which are inconsistent with the decision in this one are disapproved.

The *Towers Case*, *supra*, was an action in the circuit court of Baltimore, Maryland, to enjoin the Public Service Commission of Maryland from enforcing an order to sell commutation tickets at certain rates specified. The injunction was refused, and on appeal the court of appeals of Maryland affirmed the decree, and held that, although the order fixing the rates declared the same to be in force for ten years, there should be reserved to the railroad company the right to apply to the Commission, after the lapse of a reasonable time, for a rescission or modification of its order if experience demonstrated that the revenue derived under the tariff as established by the Commission was not properly compensatory for the services performed. The order of the Commission required the Pennsylvania Railroad Company, lessee of the Northern Central Railway, to sell tickets for the transportation of the passengers between Baltimore and Parkton within the state of Maryland on the line of the Northern Central Railway. A table appeared in the opinion of the court of appeals, showing the relative rates under the former schedule and the new order of the Public Service Commission. The order of the Commission was attacked in the *Towers Case*, *supra*, on the ground that its effect was to take the property of the railroad company without due process of law, contrary to the 14th Amendment to the Constitution of the United States; and it was also alleged, in the bill attacking the order, that if enforced it would work a discrimination against interstate travel in favor of travel within the state, and that it was otherwise unreasonable and void. It is stated in the opinion delivered by Mr. Justice Day that the court of appeals stated the question to be whether it is within the power of the Public Service Commission to require the establishment of a schedule of commutation rates by the railroad company, not where no such rates had theretofore been established,

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but where a new system of commutation rates had been proposed by the railroad company and submitted to the Commission.

Mr. Justice Day further said:

"Whether commutation rates should be established was declared to be a question of policy to be decided by the company. The court found authority in the Commission under the statutes of Maryland to revise commutation rates *where such rates had already been established by the action of the company.* [Italics ours.] We must accept this definition of authority in the Commission, so far as the state law is concerned, and direct our inquiry to the Federal question presented. The question, as counsel for plaintiff in error states it, is whether a state legislature, either directly or through the medium of a Public Service Commission, under the guise of regulating commerce, may compel carriers engaged in both interstate and intrastate commerce to establish and maintain intrastate rates at less than both the interstate and intrastate standard and legally established maxima. It is asserted that there is no constitutional authority to compel railroad companies to continue the sale of commutation or special class tickets at rates less than the legally established standard or normal one-way single passenger fare upon terms more favorable than those extended to the single one-way traveler. To maintain this proposition plaintiff in error relies upon and quotes largely from the opinion of this court in *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565. In that case a majority of this court held a statute of the state of Michigan [Pub. Acts Mich. 1891, No. 90] to be invalid. A previous statute [How. Ann. Ct. Supp. Mich. 1883-1889, § 3323, par. 9] of the state had fixed a maximum passenger rate of 3 cents per mile. The statute in controversy required the issuing of mileage books for a thousand miles, good for two years, at a less rate. This court held that a maximum rate for passengers having been established, that rate was to be regarded as the reasonable compensation for the service, and that the fixing of the less rate to particular individuals was an arbitrary exercise of legislative power and an unconstitutional interference with the business of the carrier, the effect of which was to violate the provisions of the 14th Amendment to the Federal Constitution, P.U.R.1928B.

by depriving the railroad company of its property without due process of law and denying to it the equal protection of the law. The Lake Shore Case [*supra*] did not involve, as does the present one, the power of a state Commission to fix intrastate rates for commutation tickets where such rates had already been put in force by the railroad company of its own volition, and we confine ourselves to the precise question presented in this case, which involves the supervision of commutation rates when rates of that character have been voluntarily established by the carrier. The rates here involved are wholly intrastate. The power of the states to fix reasonable intrastate rates is too well settled at this time to need further discussion or a citation of authority to support it. In *Interstate Commerce Commission v. Baltimore & O. R. Co.* 145 U. S. 263, 36 L. ed. 699, 12 Sup. Ct. Rep. 844, this Court held that a 'party rate ticket' for the transportation of ten or more persons at a less rate than that charged a single individual did not make a discrimination against an individual charged more for the same service, or amount to an unjust or unreasonable discrimination within the meaning of the act to regulate commerce. In the course of the opinion the right to issue tickets at reduced rates good for limited periods upon the principle of commutation was fully recognized. See 145 U. S. 277, 278, 279, 280. Having the conceded authority to regulate intrastate rates, we perceive no reason why such power may not be exercised through duly authorized Commissions, and rates fixed with reference to the particular character of the service to be rendered. In *Norfolk & W. R. Co. v. West Virginia*, 236 U. S. 605, 608, 59 L. ed. 745, P.U.R.1915C, 293, 35 Sup. Ct. Rep. 437, after making reference to *Northern P. R. Co. v. North Dakota ex rel. McCue*, 236 U. S. 585, 59 L. ed. 735, P.U.R. 1915C, 277, 35 Sup. Ct. Rep. 429, L.R.A.1917F, 1148, this Court said: 'It was recognized [in the North Dakota case] that the state has a broad field for the exercise of its discretion in prescribing reasonable rates for common carriers within its jurisdiction; that it is not necessary that there should be uniform rates or the same percentage of profit on every sort of business; and that there is abundant room for reasonable classification and the adaptation of rates to various groups of services.'

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"That the state may fix maximum rates governing one-way passenger travel is conceded. Having the general authority to fix rates of a reasonable nature, we can see no good reason for denying to the state the power to exercise this authority in such manner as to fix rates for special services different from those charged for the general service. In our opinion the rate for a single fare for passengers generally may be varied so as to fit the particular and different service, which involves, as do commutation rates, the disposition of tickets to passengers who have a peculiar relation to the service. The service rendered in selling a ticket for one continuous trip is quite different from that involved in disposing of commutation tickets where a single ticket may cover 100 rides or more within a limited period. The labor and cost of making such tickets as well as the cost of selling them is less than is involved in making and selling single tickets for single journeys to one-way passengers. The service rendered the commuter, carrying little baggage and riding many times on a single ticket for short distances, is of a special character, and differs from that given the single-way passenger. It is well known that there have grown up near to all the large cities of this country suburban communities which require this peculiar service, and as to which the railroads have themselves, as in this instance, established commutation rates. After such recognition of the propriety and necessity of such service, we see no reason why a state may not regulate the matter, keeping within the limitation of reasonableness. On the strength of these commutation tariffs, it is a fact of public history that thousands of persons have acquired homes in city suburbs and nearby towns in reliance upon this action of the carriers in fixing special rates and furnishing particular accommodations suitable to the traffic. This fact has been recognized by the courts of the country, by the Interstate Commerce Commission, and quite generally by the Railroad Commissions of the states. The question of the power of the Public Service Commission of the state of New York in this respect was before the appellate division of the Supreme Court of that state in *People ex rel. New York, N. H. & H. R. Co. v. Public Service Commission*, 159 App. Div. 531 [145 N. Y. Supp. 503]. In that case it was said: 'Subdivision 4 of § 33 P.U.R.1928B.

of the Public Service Commissions Law (Consol. Laws, chap. 48 [Laws of 1910, chap. 480], as amended by Laws of 1911, chap. 546) empowers the Commission to fix reasonable and just rates for such service. It is urged, however, that the statute is invalid under the rule of *Lake Shore & M. S. R. Co. v. Smith* [*supra*]. In that case the statutes of Michigan had fixed a maximum passenger rate at 3 cents per mile. A subsequent enactment required the issuing of mileage books for 1,000 miles, good for two years, at a less rate. The court held that having fixed a uniform maximum rate as to all passengers, such rate was the reasonable compensation for the service, and that the fixing of a less rate to particular individuals was an unreasonable and arbitrary exercise of legislative power; that it was not for the convenience of the public and thus within the police power, but was for the convenience of certain individuals who were permitted to travel upon the railroads for less than the reasonable rate prescribed by law; that the law was, therefore, in violation of the 14th Amendment of the Federal Constitution, in depriving the company of its property without due process of law and by depriving it of the equal protection of the laws.' "

After citing and quoting from a number of other cases, Mr. Justice Day concludes by saying:

"The reasoning of these decisions is sound and involves no violation of the Federal Constitution. True it is that it may not be possible to reconcile these views with all that is said in the opinion delivered for the majority of the court in the case of *Lake Shore & M. S. R. Co. v. Smith*, *supra*. The views therein expressed, which are inconsistent with the right of the states to fix reasonable commutation fares when the carrier has itself established fares for such service, must be regarded as overruled by the decision in this case."

[5] It will be observed that the supreme court, in discussing the Maryland case, stated that whether commutation rate should be established was declared by the court of appeals of Maryland to be a question of *policy* to be decided by the company, not where no such rates had theretofore been established, but where a new system of commutation rates had been proposed by the railroad company itself and submitted to the State Commission for its P.U.R.1928B.

approval. In such a case as that, the supreme court held that, under the statutes of Maryland, the Commission could revise commutation rates where such rates had been established by the railroad company itself. The question, therefore, arises in the instant case, where the railroad has voluntarily put into effect certain commutation rates between Atlanta and Palmetto on its line of railroad, whether such promulgation of commutation rates established such a *general policy* of commutation rates which would extend to all other points on its road. We do not think so, and are of the opinion that such action on the part of the railroad company would not give the Georgia Railroad Commission authority to extend that policy and to promulgate commutation rates, not just and reasonable, between points other than those where the railroad itself established commutation rates. The Supreme Court of the United States, in discussing the Towers Case, *supra*, refers to the matter of *discrimination* as the result of the issuance of excursion tickets, party rate tickets, and commutation tickets, and says in effect that, while there may be an element of discrimination from the promulgation and sale of such tickets, it is not an *unjust discrimination*. The Court points out the fact that commutation service is a *special service*, and says:

"The service rendered the commuter, carrying little baggage and riding many times on a single ticket for *short distances* [*italics ours*], is of a special character, and differs from that given the single way passenger."

The Civil Code 1910, § 2629, declares that:

"If any railroad corporation as aforesaid shall make any unjust discrimination in its rates or charges of toll, or any compensation for the transportation of passengers or freights of any description, or for the use and transportation of any railroad car upon its said road, . . . the same shall be deemed guilty of having violated the provisions of this article, and, upon conviction thereof, shall be dealt with as hereinafter provided."

It will be observed that it is *unjust discriminations* which are forbidden. It is not every discrimination which is, in legal contemplation, unjust. It has been held that a railroad corporation, under the foregoing section of the Code, cannot lawfully P.U.R.1928B.

demand of one passenger more fare for his transportation from one station to another upon its line than it is in the habit, *under like conditions and circumstances* of charging others for the same service. *Phillips v. Southern R. Co.* 114 Ga. 284, 40 S. E. 268. That the railroad has voluntarily put in commutation rates between Palmetto and Atlanta does not, by mere reason of that fact, make it *unjust* discrimination because there is no commutation service or rates between Newnan and Atlanta, Newnan being 13 miles further south from Atlanta than Palmetto. It is insisted by plaintiffs in error that there are reasons why the commutation rates already in existence between Palmetto and Atlanta must be continued until they are changed in some manner provided by law. Those rates are in favor of people who have located in Palmetto on the faith of the commutation rates, and good faith on its part requires that they should continue to enjoy those rates; that under Rule 14 of the Railroad Commission, the railroad, having once established such rates, cannot discontinue the same except with the consent of the Commission, or possibly, in the absence of such consent, by instituting legal proceedings to discontinue such rates. Whether all this is so is not now for decision. We reach the conclusion that the circumstances surrounding the towns which already have commutation rates are different from those surrounding Newnan and the points between Newnan and Palmetto. So the order of the Public Service Commission cannot be sustained on the ground that not to promulgate the commutation rates would be to sanction an unjust discrimination in favor of the people of Palmetto and adjacent territory, as against Newnan and other towns.

2. The evidence on the vital issue involved is undisputed. Certain of this evidence tends to show that commutation rates between Palmetto and Atlanta were voluntarily established by the railroad company with the view of building up a suburban traffic between those points. Special trains were operated for a while between those points, but the loss from their operation was so great that they were discontinued, and then for a short while they were operated between College Park and Atlanta. This service was also discontinued for the same reason, viz., that it was rendered at a heavy loss. But, while this was so, in order

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to keep faith with the people of Palmetto and the neighboring territory, the commutation rates between the two points named were continued in force. The evidence shows without controversy that for the month of June, 1925, the total amount received in the sale of commutation books was \$622.56. For the same month of June, 1926, the sale of books amounted to \$522.56. The entire number of commutation passengers hauled for those two months was 2,950 for June, 1925, and 2,562 for June, 1926. The total number of commutation books sold for five months ending May 31, 1926, was 236, or an average of $47\frac{1}{2}$ for each month. In other words, there were only 47 persons holding commutation books entitling them to ride on commutation rates between Atlanta, College Park, Union City, Fairburn, and Palmetto. The evidence for the carrier tended to show that passengers, under the commutation rates, were carried at a loss by the railroad. We have not set out in detail the evidence, but it is undisputed that the commutation rates as fixed by the Georgia Public Service Commission would entail loss upon the carrier for each passenger who would be transported between Newnan and Atlanta. Therefore, we reach the conclusion that the court below did not err in permanently enjoining the Georgia Public Service Commission, and each of its members, from enforcing the commutation rates promulgated by it. To enforce the order would deny the carrier due process of law and the equal protection of the laws.

Judgment affirmed.

All the Justices concur, except Russell, C. J., and Atkinson, J., who dissent from the ruling in the fourth headnote.

Hines, J., concurs in the result.
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ILLINOIS SUPREME COURT.

CHICAGO & NORTHWESTERN RAILWAY COMPANY
v.
ILLINOIS COMMERCE COMMISSION.

[No. 18333.]

(— Ill. —, 158 N. E. 376.)

Crossings — Elimination of grade crossings — Grading rules of highway department — Commission order.

1. A Commission order for a separation of grades that would involve a construction of subway instead of an overpass for the highway was held not unreasonable or arbitrary in view of the fact that the latter type of construction would necessitate road building in excess of the 6 per cent maximum grade rule followed by the highway department as well as hazardous curves on grades at the approaches, p. 156.

Crossings — Consent to regulation of crossings by state with the acceptance of franchise.

2. A railroad in accepting its franchise agrees to submit to all burdens, conditions, and regulations imposed by the state with reference to its tracks and their intersections with highways necessary for the safety of the traveling public, p. 156.

Constitutional law — Construction with reference to police power.

3. The Constitution supposes the pre-existence of the police power in the state, and its construction must be with reference to that fact, p. 156.

Crossings — Jurisdiction of Commission — Elimination of grade crossing.

4. A separation of grades shall be ordered by the Commission under the Public Utilities Act (§ 58, Smith-Hurd Rev. St. 1925, Chap. 111½, § 62), only when necessary to preserve or promote public safety, p. 156.

Appeal and review — Powers of appellate court.

5. Courts reviewing orders and decisions of the Commission as to reasonableness of its conclusions will examine the facts upon which the order is based, and, if there is substantial evidence to support it, the order will be sustained, p. 156.

Constitutional law — Police power over separation of grades.

6. An order of the Commission requiring a railroad at its own expense to relocate its crossing on a highway and to change from an overhead crossing to a subway is a valid exercise of the police power of the state in the interest of public service and does not shift to the carrier the burden of public improvement so as to infringe the company's rights under the Constitution of the United States (14th Amendment) or that of the state of Illinois (§ 13, Article 2), p. 156.

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Evidence — Oral testimony as to written matter — Prejudicial error.

7. A wrongful admission of oral testimony as to the construction policy of the highway department with reference to grades (the rules of that department being in writing) was held not to be consequential error where the state testimony was not vital to the question in issue at the Commission hearing, p. 158.

Evidence — Procedure as to admissibility of testimony before Commission.

8. The same rules as to the admissibility of evidence as obtain in a court should be observed by the Commission in its hearings, p. 158.

Evidence — Cross examination of witness on matters not in evidence.

9. Cross examination of a Commission's witness upon an exhibit not at that time placed into evidence, nor concerning which the witness had testified, was correctly denied to a railroad attacking Commission's order in lower court, p. 159.

Evidence — Cross examination of expert witnesses.

10. Questions concerning facts within the common knowledge of man were correctly denied on cross examination of expert witnesses, p. 159.

Interstate commerce — Jurisdiction of Interstate Commerce Commission over securities — Improvements involving sale of securities.

11. The fact that the expense incident to the separation of grades might involve the sale of bonds under control of Interstate Commerce Commission (U. S. Transportation Act of 1920) does not deprive the Illinois Commission of jurisdiction to order such separation where there is no competent evidence tending to show that a sale of any security under control of the Interstate Commerce Commission would in fact be necessary, p. 159.

Interstate commerce — Carriers subject to local police power over crossings.

12. The authority of a railroad to project its trains across thoroughfares in interstate commerce must be subject to such limitation as may be imposed upon it by the state in the interest of the safety of its citizens, p. 160.

[October 22, 1927.]

APPEAL from decree of Circuit Court affirming an order of the Illinois Commerce Commission granting a petition of the highway department for relocation of highway over railroad's tracks; appeal dismissed and decree and order affirmed.

Appearances: Nelson J. Wilcox, of Chicago, Nelson Trotteman, of Milwaukee, and George C. Rider, of Pekin, for appellant; Oscar E. Carlstrom, Attorney General, Albert D. Rodenberg, of Springfield, W. E. Trautmann, of East St. Louis, and B. L. Catron, of Springfield, for appellee.

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Heard, C. J.: This is an appeal from an order of the circuit court of Tazewell county affirming an order of the Illinois Commerce Commission, based on a petition of the Department of Public Works and Buildings, for a relocation of Route 24 of the state highway system at a point where the highway crosses the tracks of appellant near Green Valley.

Route 24 runs in a general northerly direction from Springfield to Peoria. The construction of the pavement on this route has been completed, with the exception of short distances each way from the proposed crossing in question. As at present located, this highway extends in a northwesterly direction from Green Valley and then turns west over appellant's tracks on an overhead wooden bridge. About 150 feet west of the bridge Route 24 makes a right angle turn to the north and continues thence on a 10 or 12 per cent grade northerly toward Pekin and Peoria. The existing east and west road has a sag in its grade line east of the present overhead bridge. The floor of the bridge is a convex curve, being higher in the middle than at either end, and the bridge is reached by an ascending grade from both directions. In its petition the highway authorities proposed to relocate the route so that it would leave the existing east and west road at a point about 800 feet east of the overhead bridge; then extend on a descending grade somewhat less than 5 per cent diagonally in a northwesterly direction to the railroad at a point approximately 270 feet north of the bridge, at which point the railroad embankment is about 18 or 20 feet high, there to pass under the railroad by a subway; thence continue practically level, curving to the north on a 28 degree curve until it meets the existing north and south road west of the tracks at a point about 540 feet north of the east and west road, the maximum cut or fill of the relocated road not exceeding 6 feet. The Commission entered an order granting the prayer of the petition, finding from the evidence that the proposed cut-off and subway are necessary to preserve and promote the safety of the public, and directed the railroad company at its own expense to install or cause to be installed the necessary false work to support its tracks and roadbed and its railroad traffic thereon at the proposed subway location, and to maintain the false work during such time as the construction of

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the proposed subway, and the highway leading to the same, should be in progress, the false work to be so installed as at a later date to permit of the construction of a permanent subway structure. The order further directed that the Department of Public Works and Buildings at its own expense should perform all necessary excavation and labor and furnish all materials necessary to construct the road through the subway opening, together with all necessary drainage openings.

[1] It is first contended by appellant that the evidence fails to show any necessity for the relocation of the road. The right angle turn on the present highway is made on a steep grade, with a fall of at least 30 feet within a distance of 338 feet from the bridge. The evidence shows that in the construction of the system of hard roads the state highway department, with a view of promoting the safety of the public, eliminates right angle turns, substituting therefor curves, and builds its roads wherever possible, with a grade not to exceed 5 per cent, although it sometimes, under extraordinary conditions, adopts a 6 per cent grade. While appellant argues that the right angle turn would cause motorists to slow up in making the turn and thus be conducive to their safety, the evidence clearly shows that this turn, situated as it is, is extremely dangerous, and that by reason of the fact that it is only 150 feet west of the bridge it could only be reduced to a curve of about 38 per cent in approaching the bridge, and that this approach would have to be made on an embankment rising to a height of 20 feet and with at least a 6 per cent grade running from 1,200 feet north of the bridge. The evidence clearly shows that the proposed location is very much safer than any possible adjustment which might be made with reference to the road passing over the present overhead bridge, and that the proposed subway is necessary for the safety of the public in traveling over that part of Route 24 which is here in question, and that the order was not unreasonable or arbitrary.

[2-6] It is contended by appellant that the order infringes the constitutional rights of appellant, in that it assumes to shift to appellant part of the burden of a public improvement, and so is not within the scope of the police powers of the state. A railroad is a public utility deriving its franchise from the state, and, P.U.R.1928B.

by accepting the same, agrees to submit to all burdens, conditions, and regulations imposed by the state with reference to its tracks and their intersections with highways necessary to promote or secure the safety of the traveling public. Roads and bridges are not merely for local use, but are for the use and accommodation of all citizens of the state. *People ex rel. Franklin County v. Williamson County*, 286 Ill. 44, 121 N. E. 157. The Constitution supposes the pre-existence of the police power, and its construction must be with reference to that fact. *Chicago v. M. & M. Hotel Co.* 248 Ill. 264, 93 N. E. 753.

The proceeding in this case is had under § 58 of the Public Utilities Act (Smith-Hurd Rev. St. 1925, Chap. 111½, § 62), which provides as follows:

"The Commission shall also have power by its order to require the reconstruction, alteration, relocation, or improvement of any crossing (including the necessary highway approaches thereto) of any railroad across any highway or public road, whether such crossing be at grade or by overhead structure or by subway, whenever the Commission finds after a hearing that such reconstruction, alteration, relocation or improvement is necessary to preserve or promote the safety of the public or of the employees or passengers of such railroad. By its original order or supplemental orders in such case, the Commission may direct such reconstruction, alteration, relocation or improvement to be made in such manner and upon such terms and conditions as may be reasonable and necessary and may apportion the cost of such reconstruction, alteration, relocation, or improvement between the railroad company or companies and other public utilities affected, or between such company or companies and other public utilities and the state, county, municipality, or other public authority in interest. The cost to be so apportioned shall include the cost of changes or alterations in the equipment of other public utilities affected as well as the cost of the relocation, diversion, or establishment of any public highway, made necessary by such reconstruction, alteration, relocation or improvement of said crossing."

Under this section a relocation can be ordered only when necessary to preserve or promote public safety. The statute is specific upon this point. The Commission is not given the power arbitrary. P.U.R.1928B.

trarily to shift the financial burden of a highway relocation from the state to a railroad corporation. Nor could the legislature provide for such shifting of the burden. If this were attempted by statute or order of the Commission, it would constitute an invasion of the company's constitutional rights guaranteed under the 14th Amendment to the United States Constitution and under § 13 of article 2 of the Illinois Constitution. The police power of the state is, however, in matters touching the public safety, a broad one, and, undoubtedly, for the promotion of public safety, railroad property may in a proper case be subjected to uncompensated obedience to police regulations (*Chicago & N. W. R. Co. v. Chicago*, 140 Ill. 309, 29 N. E. 1109; *East Side Levee & Sanitary Dist. v. Mobile & O. R. Co.* 279 Ill. 319, 116 N. E. 727); and the railroad company compelled to relocate its crossing of a highway and at its expense change from an overhead crossing to a subway when necessary to promote or preserve the public safety. The orders and decisions of the Commission are subject to review as to the reasonableness of its conclusions. Reviewing courts will examine the facts upon which the order is based, and, if there is substantial evidence to sustain the order, the order will be sustained. *Chicago Motor Bus Co. v. Chicago Stage Co.* 287 Ill. 320, P.U.R.1919D, 157, 122 N. E. 477. In the instant case the Commission found that it would be impracticable to construct Route 24 on the existing highway, as it extends across appellant's railroad on the overhead bridge, and that such location would be a source of danger to highway traffic in traveling over the same, if so constructed, the danger being due principally to the sharp turn in the highway west of the overhead bridge and to the necessity for maintaining a steep approach grade on a sharp curve on a high embankment, and found that public convenience and necessity required the extension of the route underneath appellant's railroad track by means of a subway in the proposed location.

[7, 8] It is contended by appellant that it was error for the Commission to allow a witness to testify to the rules and regulations of the highway department with reference to the per cent of grades, the rules being in writing. While the Commission is not a court, the same rules as to the admissibility of evidence as P.U.R.1928B.

in a court should be observed in its hearings. The testimony was incompetent, but, as the rules of the Commission neither proved nor tended to prove the vital question in issue, the error in its admission was inconsequential.

[9] Appellant complains that it was not allowed to cross-examine one of appellee's witnesses with reference to an exhibit attached to the petition, which had not at that time been introduced in evidence, and concerning which the witness had not been examined in chief. There was no error in this respect.

[10] Complaint is made by appellant that it was limited in its cross-examination of some of appellee's witnesses. The questions to which objections were sustained were largely as to the opinion of the witnesses upon questions which did not require special knowledge or skill, but were upon subjects which were within the common knowledge of mankind, and, therefore, not proper subjects for expert or opinion testimony.

[11] It is contended by appellant that the Illinois Commerce Commission was without jurisdiction to make the order appealed from, for the reason that the expense involved in this subway is a capital expense, and in appellant's present financial condition it would have to be financed by the sale of bonds, and that under the United States Transportation Act of 1920 the matter of railroad security issues is placed entirely in the control of the Interstate Commerce Commission. The section invoked by appellant is as follows:

"From and after one hundred and twenty days after this section takes effect it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') . . . unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, . . . the Commission by order authorizes such issue or assumption." Section 439, par. 2 (49 USCA § 20 a [U. S. Comp. St. § 8592a]).

There is no competent evidence in the record showing that to meet the expenditure required in the relocation of the crossing
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appellant would be compelled to issue any capital stock, bonds, or any other evidence of interest in or indebtedness of the carrier. The only evidence on this subject is conclusions of one of appellant's officials, received in evidence subject to appellee's objection, to the effect that the proposed subway would involve a capital expenditure; that the market value of the stock of the company is below par; and that, in his opinion, in order to finance the payment of the company's share of the cost of the proposed subway, it would be necessary for the company to sell bonds. He did not testify that it would be necessary for the company to issue bonds or whether the bonds to be sold were the company's bonds or other securities held by it in a sinking or other fund. No evidence was introduced showing the financial condition of the company, its earnings, the surplus funds in its treasury, if any, the amount of its then outstanding notes of a maturity of two years or less, the amount of the par value of its securities then outstanding, or that it was not in a position to meet this expense without resort to any of the stock or securities mentioned in this section of the Transportation Act. Paragraph 9 of the section from which the above quotation is made provides:

"The foregoing provisions of this section shall not apply to notes to be issued by the carrier maturing not more than two years after the date thereof and aggregating (together with all other than outstanding notes of a maturity of two years or less) not more than 5 per centum of the par value of the securities of the carrier then outstanding."

[12] The order in question does not in any manner tend to interfere with, hinder, or delay appellant in the regular running of its trains in its interstate commerce. To engage in interstate commerce the railroad must go on the land, and the authority of the railroad to project its trains across thoroughfares must be taken to be subject to the implied limitation that it is subject to such limitations as may be imposed upon it by the state which are necessary for the safety of its citizens. *Erie R. Co. v. Public Utility Comrs.* 254 U. S. 394, 65 L. ed. 322, P.U.R.1921C, 143, 41 Sup. Ct. Rep. 169. The state has some sovereign rights. It has the "unquestioned police power to regulate grade crossings in the interest of the public safety." *California R. Commission* P.U.R.1928B.

v. Southern P. Co. 264 U. S. 331, 68 L. ed. 713, P.U.R.1924D, 246, 44 Sup. Ct. Rep. 376. The Commission had jurisdiction to enter the order.

We do not deem it necessary to discuss the question of the apportionment of the expenses involved in the relocation further than to say that a careful study of the estimates made by the various engineers shows that the adjustment made by the Commission was entirely equitable.

Finding no reversible error in the record, the order entered by the circuit court is affirmed.

Order affirmed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

MONONGAHELA WEST PENN PUBLIC SERVICE
COMPANY et al.

v.

STATE ROAD COMMISSION OF WEST VIRGINIA et al.

BALTIMORE & OHIO RAILROAD COMPANY

v.

SAME.

[Nos. 6005-6007.]

(— W. Va. —, 139 S. E. 744.)

Monopoly and competition — Burden of proof to show inadequate existing service — Motor utility.

1. Under § 82, Chap. 17, of the Acts of the Legislature of 1925, no permit to operate motor vehicles for public transportation for hire shall be issued by the State Road Commission until it be established upon a proper investigation that the privilege so sought by the applicant is necessary or convenient for the public, and that the proposed service is not then being adequately performed by any other persons, partnership, or corporation, p. 169.

Monopoly and competition — Protection for existing carriers — New routes — Automobiles.

2. The public policy of this state, as expressed in legislative enactments, requires that public utilities be given reasonable protection from
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detrimental competition. Wherefore, when an existing carrier is one of several applicants for the initial permit to operate motor busses over a highway between points served by the railroad of the carrier, and it is fully qualified to render the additional service proposed, the State Road Commission should ordinarily give the preference to the carrier, p. 167.

(Woods, J., dissents.)

[September 20, 1927.]

Headnotes by the COURT.

WRIT OF ERROR to review the order of the circuit court reversing order of the State Road Commission and awarding certificate of convenience to an applicant, the subsidiary of an existing carrier in preference to other applicants; affirmed.

Appearances: Howard B. Lee, Attorney General, and R. Dennis Steed, of Charleston, for plaintiff in error, State Road Commission, T. C. Townsend, of Charleston, and E. G. Smith, of Clarksburg, for plaintiff in error, Reynolds Taxi Company; Guy H. Burnside and Lynch & Lynch, all of Clarksburg, for plaintiff in error, Bartlett Brothers Bus Company; Poffenberger, Blue & Dayton, of Charleston, for West Virginia Motor Transportation Association; Steptoe, Maxwell & Johnson, of Clarksburg, Meredith & Bell, of Fairmont, and Conley & Johnson, of Charleston, for defendants in error.

Hatcher, P.: These cases are here on writs of error to judgments in certiorari of the circuit court of Kanawha county. The appellants heretofore challenged the jurisdiction of the circuit court herein, by separate petitions in prohibition filed in this court. Our decision thereon was rendered February 8, 1927, and is reported in 136 S. E. 833. The history of the several proceedings to that date as stated there is, for convenience, copied here:

"The Monongahela West Penn Public Service Company owns and operates, as a public carrier in West Virginia, a system of electric railway lines. For the purpose of providing additional service and protecting itself from injurious competition by independent bus lines, it organized the Monongahela Transport Company to operate bus lines in territory served by its electric railway system. The Baltimore & Ohio Railroad Company, owning P.U.R.1928B.

and operating steam railways as a public carrier in this state, for like reasons and purpose organized the West Virginia Transportation Company.

"Upon application being made by the Reynolds Taxi Company for a certificate of convenience to operate motor vehicles carrying passengers for hire between Clarksburg and Buckhannon, by way of Jane Lew and Weston, the Monongahela West Penn Public Service Company and the Baltimore & Ohio Railroad Company filed protests thereto and caused their subsidiaries, Monongahela Transport Company and West Virginia Transportation Company, to apply for a certificate of convenience to operate motor vehicles carrying passengers for hire between Weston and Buckhannon. And, an application being made by Bartlett Brothers Bus Company for a certificate of convenience to operate motor vehicles carrying passengers for hire between Clarksburg and Grafton, the Baltimore & Ohio Railroad Company filed a protest thereto, and, through its subsidiary, the West Virginia Transportation Company, applied for a similar certificate of convenience. After a full hearing, the Road Commission granted the applications of the Reynolds Taxi Company and the Bartlett Brothers Bus Company, and refused those of Monongahela Transport Company and the West Virginia Transportation Company. Thereafter the circuit court of Kanawha county, on applications of Monongahela West Penn Public Service Company, Monongahela Transport Company, Baltimore & Ohio Railroad Company, and West Virginia Transportation Company, awarded writs of certiorari to the rulings of the State Road Commission, and these proceedings followed."

Prohibition was denied, and the cases were heard by the circuit court. It set aside the order of the Commission in each case, and awarded certificates of convenience to West Virginia Transportation Company over the routes from Weston to Buckhannon, and from Clarksburg to Grafton.

Error is charged to the circuit court on procedure as well as the merits.

Procedure.

The order of the Commission awarding the several certificates
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to the petitioners was entered on July 19, 1926. The applications for the writs of certiorari were made on August 6, 1926. During that interval the petitioners expended some time, labor, and money in preparing to exercise their rights under the awards. They now contend that the failure of appellees "to disclose their intention to contest the Commission's orders, and in delaying the filing of their petition" in the circuit court, is such laches as calls for reversal. The evidence shows, however, that appellees did not receive from the Commission notice of its rulings until August 2. A delay of only four days in preparing and filing the petitions herein was not unreasonable, and does not constitute laches.

Appellants also contend that the records of the Commission's proceedings, which were before the circuit court, cannot be considered, because they do not comply with § 3, chap. 110, Code, as construed in *Bee v. Seaman*, 36 W. Va. 381, 15 S. E. 173, *Cushwa v. Lamar*, 45 W. Va. 326, 32 S. E. 10, and other decisions of this court, and because they do not purport to include such facts as the Commission may have obtained upon its own "proper investigation."

Certain exhibits were filed by these appellants in the prohibition cases, which their petitions averred were copies of the records in the several proceedings had before the Commission in which appellants were awarded the certificates under consideration. While the prohibition cases were pending here, the files of the Commission were destroyed by fire. In order to make as complete a return as possible to the writs of certiorari, the Commission secured from this court the very exhibits which appellants had filed in the prohibition cases, and tendered them to the circuit court as "complete records." The return did not allege that the Commission made any investigation not appearing in the records. It is those very records which appellants now seek to discredit.

After proffering those records in the prohibition proceedings, the appellants will not be permitted to question them in these cases. "A party cannot either in the course of litigation or in dealings in pais occupy inconsistent positions. Upon that rule election is founded; 'a man shall not be allowed,' in the language P.U.R.1928B.

of the Scotch law, 'to approbate and reprobate.'" Bigelow on Estoppel (6th Ed.) 732. "Parties will not be permitted to assume successive inconsistent positions in the course of a suit or series of suits in reference to the same fact or state of facts." MacDonald v. Long, 100 W. Va. 551, 131 S. E. 252.

The Merits.

Appellants contend in these cases, as they did in the prohibition cases, that the sole power to grant or refuse certificates of convenience has been vested in the Commission by the legislature. We decided in the prohibition cases that the rulings of the Commission herein were subject to judicial review. That decision is *res adjudicata*, and further argument thereon is fruitless. Upon such review § 3, chap. 110, Code, requires the circuit court to "determine all questions arising on the law and evidence, and render such judgment or make such order upon the whole matter, as law and justice may require." The plain language of the statute indubitably conferred upon the circuit court jurisdiction to make the awards contained in its order without referring the cases back to the Commission. Cases 6006 and 6007, respectively, involve simply a choice of applicants for the initial permit to operate a bus line. In each case both applicants are fully able to render adequate service to the public. In each case the Commission preferred the appellant, presumably because of priority of application, as the evidence discloses no other advantage over the other applicant. In each case the circuit court reversed the Commission and gave the preference to the appellee, presumably to safeguard a large railway investment along or near the route in question. Consequently the single inquiry presented in each of these cases is, Which applicant does law and justice favor?

Appellants assert that all property rights of a railroad are confined to its right of way, that its rights do not extend to parallel highways, and that it has no legal priority to pre-empt the field of motorbus transportation, to the exclusion of other applicants desiring to render like service. Appellants rely largely on *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. ed. 773, and kindred cases in support of their position. The gist of P.U.R.1928E.

the Bridge Case decision is that grants of privileges from a state are strictly construed; that nothing passes by implication; that a toll bridge franchise, not made exclusive, will not be so construed; and that another bridge may thereafter be chartered in the same vicinity, impairing or even destroying the value of the first bridge.

That case was decided in 1837. Then "Competition is the life of trade" was accepted as a guiding maxim of economics. That maxim has long since been rejected so far as it applies to public utilities. Uncontrolled competition is now regarded as destructive of such utilities. In 1837 the state watched with indifference one public utility stifle another. Now the state controls its public utilities, and, as an incident to its regulatory power, acknowledges a duty to protect them. As a part of that protection, the state now guards against unnecessary duplication of public utilities. Consequently, the decision in the Bridge Case, *supra*, is not applicable to cases like these, where regulated utilities are concerned.

The appellees make no claim to exclusive charter right or specific legal or statutory grant of priority of right to pre-empt bus service on our highways. Their position may be summarized as follows: The railroads perform certain vital services to the public which bus companies cannot perform, and, therefore, must be preserved; the railroads have large investments, and, to make adequate returns thereon as well as to maintain their roads, equipment, and service properly, need all the income available under present rates and conditions; competitive bus companies will divert a material amount of travel from the railroads, thereby diminishing the revenues of the latter; reduced revenues will necessarily cause one of two things, (a) rates will be raised to meet the loss thus occasioned, or (b) the efficiency of railroad service will be impaired; either contingency will seriously affect the general traveling public, but these contingencies may be avoided by permitting the railroads or their subsidiaries to render and receive the emoluments from the bus service, which would otherwise be competitive; because of greater resources the railroads afford greater security to the public in performing bus service than that offered by the ordinary bus
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companies; and the interests of the public will, therefore, be better served by giving the existing carriers the preference over other applicants for certificates of convenience.

[2] The argument of the railroads has met the approval of court and Commission. "Railroads have permanent roadbeds and trackage which require an outlay of millions of dollars and which in turn yield large revenue to the people of the state. The average bus line is incorporated for a comparatively small sum. The railroad is of vastly greater financial responsibility. This is a matter of substantial public interest, particularly in cases of accident. It is the established policy of the law in this state that a public utility be allowed to earn a fair return on its investments. It is, therefore, not only unjust but poor economy to grant to a much less responsible utility company the right to compete for the business of carrying passengers by paralleling its line, unless it appears that the necessary service cannot be furnished by such railroad. Appellants offer to provide whatever increase in accommodations and service is deemed essential to meet the public convenience and necessity. It is but consonant with our law regulating public utilities that they be given opportunity to do so." *Egyptian Transp. System v. Louisville & N. R. Co.* 321 Ill. 580, 588, P.U.R.1926E, 275, 152 N. E. 510, 513. In accord therewith are the following Commission decisions: *Washington R. & Elec. Co. v. Washington Rapid Transit Co.* (D. C.) P.U.R.1922C, 754; *Re Blue & Gray Bus Line* (Utah) P.U.R.1924A, 449, which goes so far as to yield to railroads a "natural preferential right to extend service instead of permitting competition by an auto bus company"; *Re United Stages* (Cal.) P.U.R.1924D, 762; *Re Wentworth* (N. H.) Order No. 1759, December 22, 1925; *Re Maine Motor Coaches* (Me.) P.U.R.1926B, 545, citing decisions from the Commissions of 27 states as "in harmony" with the conclusion reached in that case. The foregoing decisions are only one step in advance of, and are the logical conclusion to the masterly opinion written by Judge Miller in *Princeton Power Co. v. Calloway*, 99 W. Va. 157, 163, 128 S. E. 89, 91, wherein he declares the policy of this state in regard to railroads:

"The policy of the state as evidenced by the road law and of P.U.R.1928B.

the statutes relating to the Public Service Commission, its powers and duties, is not to invite or encourage ruinous competition between public carriers; on the contrary its policy is to protect such public servants in the enjoyment of their rights, so that the public may be served most efficiently and economically, and by the best equipment reasonably necessary therein. As illustrative of the application of this power respecting public carriers, see *Chesapeake & O. R. Co. v. Public Service Commission*, 75 W. Va. 100 [83 S. E. 286, L.R.A.1917F, 1190]; *Id.*, 78 W. Va. 667, P.U.R.1917A, 104 [89 S. E. 844.]

"With the burden and duty thus imposed upon a carrier, and the public control thereof established by law, is not the state under the moral, if not the legal, obligation, to give reasonable protection, consistent with the public weal, to the rights and franchises of such public service corporations? We think it is. As evidence of the protection which the state intended giving public carriers with permits under the state road law, the Act of 1923 [Acts 1923, chap. 6], amending the law of 1921, provides that no such permit shall be issued until it shall be established to the satisfaction of the Commissioners that the privilege, etc., is necessary or convenient for the public, and that this service, etc., is not being adequately performed by *any other person*. Observe also to what extent the law protects established ferries and toll bridges, and provides against the incursion of unauthorized and ruinous opposition by unlicensed persons. Chapter 44, Barnes' Code 1923. All this is in the public interest; for, unless those with licensed authority are so protected in the reasonable exercise of their rights, they cannot live to serve the public well and efficiently."

Priority of time in application, while an element to be considered, is not ordinarily of sufficient importance to control the granting of a certificate. *Chicago Motor Bus Co. v. Chicago Stage Co.* 287 Ill. 320, P.U.R.1919D, 157, 122 N. E. 477. Law and justice require that mere priority of application should yield to the graver element of public policy, and we so hold in these cases.

Warren-Salem Coach Line Co. v. Public Utilities Commission, — Ohio St. —, P.U.R.1927D, 379, 156 N. E. 453, and P.U.R.1928B.

Norfolk Southern R. Co. v. Commonwealth, 141 Va. 179, P.U.R. 1925C, 555, 126 S. E. 82, are cited by appellants as presenting facts similar to, and as supporting their contentions in, the instant cases. Those cases, however, did not involve a choice of applicants for the same service. In each case it was determined that the existing service was not adequate and that an additional service was needed. In neither case did the existing carrier seek permission to perform that additional service. Each case rightly makes the public convenience and necessity paramount to the interest of the utility. Neither case is in conflict with our decision here. On the contrary, point 4 of the syllabus of the Virginia case supports it:

"Upon application by a motor vehicle carrier for a certificate of convenience and necessity, existing transportation systems should be protected so far as compatible with the public interest."

Case No. 6005 involves the cancellation by the circuit court of the certificate of convenience issued to the Reynolds Taxi Company over the route between Clarksburg and Weston. The evidence shows that eighteen electric cars and three railway trains operate daily each way between these two points. R. T. Reynolds, the chief witness for the Taxi Company, stated that there were forty-two families between Gusman's Bridge and Deanville (two intermediate points between Clarksburg and Weston) that do not reside close to either a railroad or traction stop. In commenting on the general service of the electric cars, between the terminal points, the witness made this admission:

"I know they give them hourly service, and pretty good service I call it, whether adequate service or not, I am not in position to know."

[1] Before such a certificate shall be issued, the statute requires it to be established that the privilege sought is necessary or convenient for the public, and that the service so proposed is not being adequately performed by another. Courts and Commissions construing statutes similar to ours have uniformly held that the necessity and convenience referred to is that of the public generally as distinguished from that of a number of individuals or a community, and that the inadequacy of the existing P.U.R.1928B.

service and the convenience or necessity of the proposed service must both affirmatively appear from the evidence. *Choate v. Interstate Commerce Commission*, 309 Ill. 248, 141 N. E. 12; *McLain v. Public Utilities Commission*, 110 Ohio St. 1, P.U.R. 1924E, 712, 143 N. E. 381; *Re Motor Transit Co.* (Cal.) P.U.R. 1922D, 495; *Re Jitney Applications* (R. I.) P.U.R. 1922E, 612; *Re Paradox Land & Transport Co.* (Colo.) P.U.R. 1923E, 759; *Re Alabama Power Co.* (Ala.) P.U.R. 1923E, 828 (832); *Re Branham* (Ariz.) P.U.R. 1924C, 500; *Re United Stages* (Cal.) P.U.R. 1925A, 688. The record discloses no demand for additional carrier service between Clarksburg and Weston, either by the general public or by the Gusman's Bridge-Deanville segment. It fails to establish as an evidential fact that the existing carriers do not serve *the general public* adequately. It, therefore, does not justify the granting of a certificate of convenience between Clarksburg and Weston, and the cancellation of the certificate by the circuit court was proper.

The decision in Cases 6006 and 6007 applies only to a choice of applicants for a permit over a bus route about to be established. It has no reference to a case where a railroad or street car company is an applicant for permission to operate motor vehicles over an established bus route. The holder of the permit over the established route is entitled to the same protection and consideration as any other public utility.

The order of the circuit court in each case will be affirmed.

Woods, J. dissenting: When the parties to these appeals were before this court in prohibition, I dissented from the holding of my associates on the ground that the statute vesting in the Road Commission the power of granting certificates of convenience was not subject to review—the act being governmental in its nature and not judicial. Nor was I able to agree to the doctrine there announced that existing carriers by rail possess a property right to be considered in their favor over other applicants for certificates of convenience. As I view it, there is no express or implied legislative policy in this state which gives support to that doctrine.

Whether the court has jurisdiction to review the action of P.U.R. 1928B.

the Road Commission in granting certificates of convenience, is now water over the wheel. So I will simply reaffirm my belief in the soundness of my original view on that question and confine this note to the question of whether there is a property right in the existing rail carriers to a right of priority in favor of them over other applicants for bus service, on hearing by the Commission for the purpose of granting certificates of convenience. The language of the statute regulating the issuance of certificates of convenience limits the Commission to the inquiry whether the service proposed to be rendered by the applicant is "necessary or convenient for the public" and whether it is being "adequately performed at the time of such application by any other person, partnership or corporation." The supreme court of Michigan, in *Rapid R. Co. v. Michigan Pub. Utilities Commission*, 225 Mich. 425, P.U.R.1924B, 585, 591, 196 N. W. 518, expressly held that the Commission, in passing on applications for permission to engage in the business of transporting passengers in motor vehicles between certain points, providing for the issuance of such permit in accordance with public convenience and necessity, cannot consider other transportation facilities, such as railroads, in passing on question of convenience and necessity, but must limit inquiry to the motor vehicle business. The following excerpt from the court's opinion is apropos to the situation in this state:

"The grant of the power to determine whether, in view of the service rendered by other means of transportation, a necessity exists, or the public convenience requires, that a new system of transportation should not be permitted in competition with those operating between certain points, should not be inferred unless the language is fairly expressive of such an intent on the part of the legislature. This is an age of evolution in the transportation business. Steam railroads service greatly reduced the earnings of the vessels carrying passengers and freight, and put the stage coach out of business. Electric cars have much affected the business of the steam roads between certain points. The use of motor vehicles will doubtless decrease the earnings of the electric roads. If it be desirable to clothe the Commission with the power to prevent such competition by refusing to permit motor P.U.R.1928B.

vehicles to operate, when the service rendered by the steam and electric roads is adequate to the needs and convenience of the public, we think the legislature should so provide in no uncertain language."

The purpose of our statute, as disclosed by its title, is to regulate the use of such motor vehicles on the highways. I find no intention in its language to do more than this. Our legislature sought to restrict the number of motor vehicles using the highways for the conveyance of persons and property for hire by imposing a privilege tax on them, and required a finding by the Road Commission of the public convenience and necessity—thus empowering said Commission in the public interest to determine the number of persons, firms, or corporations who should be permitted to so operate. A sound policy is thus disclosed of the state demanding, as the first consideration, adequacy of service of the traveling public, rather than the protection of carriers by rail against motorbus carriers. In *McLain v. Public Utilities Commission*, 110 Ohio St. 1, P.U.R.1924E, 712, 720, 143 N. E. 381, which involved a construction of the Ohio Act of 1923 (110 Ohio Laws, p. 211), requiring certificates of convenience of motor vehicle transportation, the court said:

"Nor do we concur in the view of those courts who have expressed the view that any public utility requirement has for its purpose 'the establishment of a policy of protecting existing railroad transportation as against motor transport interest.' Nor, indeed, do we concur in any policy of protecting any existing public utility against competing public utilities, but consider rather that it is the policy of the Federal government and the government of the various states by legislation to secure to the general public, through Public Utility Commissions, or similar administrative bodies, adequate service from public utilities, which of course includes price, character of service, and continuity, that regulation through Commissions is for the purpose of accomplishing the ultimate object, adequate service, and that the benefits, if any, by way of restricted competition, etc., which inure to establish public utilities, are incidental to such regulation, but not its object or purpose."

The supreme court of Virginia has recently decided in accord P.U.R.1928B.

with the view expressed by the Ohio court. *Norfolk Southern R. Co. v. Commonwealth*, 141 Va. 179, P.U.R.1925C, 555, 126 S. E. 82. The service rendered by a new means of transportation frequently is so different from the existing means of transportation that it can be considered only incidentally competitive with it. It was thus when the railroads supplanted the stage coach; the traction system, the railroad; and now the motorbus, the field of its predecessors.

This court, in *Carson v. Woodram*, 95 W. Va. 197, P.U.R. 1924B, 785, 120 S. E. 512, in construing that portion of the statute which requires a certificate of convenience, held that persons operating automobiles under such license or permit for the carriage of passengers for hire over public highways between fixed termini may enjoin others without such license or permit from engaging in a like service. In *Quesenberry v. State Road Commission*, 103 W. Va. 714, P.U.R.1927E, 455, 138 S. E. 362, this court expressly held that the action of the Commission is ministerial and administrative, and does not come within the realm of the judiciary only where the granting or the refusing of the certificate of convenience affects a right of property of existing carriers. I am in accord with that view aside from the limitation. *Princeton Power Co. v. Calloway*, 99 W. Va. 157, 128 S. E. 89, cited to support the doctrine announced in the prohibition proceeding involving the parties to this appeal, held that the *illegal* operation of motor vehicles for compensation between fixed termini may be enjoined by a paralleling carrier by rail, and that the injunction in favor of the traction company would remain in force only until the operators of such motor vehicles "shall have acquired authority and have qualified . . . in the manner provided by law" for the operation of their motor vehicles over the route and between the termini in question. Instead of being an argument in favor of the doctrine announced that existing railroads had a prior right to be considered on application for motorbus transportation over other applicants, the question submitted considered and determined in that case argues strongly to the contrary.

The Illinois supreme court, in *Egyptian Transp. System v. Louisville & N. R. Co.* 321 Ill. 580, P.U.R.1926E, 275, 152 P.U.R.1928B.

N. E. 510, is relied on in the opinion of this court to sustain the position that, before a competing utility is allowed to parallel existing rail lines and take their business from them, said rail carriers should be given the opportunity to supply all needed service. However, this case is robbed somewhat of its value as a precedent governing here by the same court in the latter case of Bartonville Bus Line v. Eagle Motor Coach Line, 326 Ill. 200, P.U.R.1927E, 333, 157 N. E. 175, wherein it is stated that in the former case the decision was based on a policy of the state "established by legislation." As we have shown, there is no such legislative policy, either express or plainly implied, in our state. In the Bartonville Bus Line Case, *supra*, the Illinois court modified its former decision in the Egyptian Case, *supra*, by expressly holding that, while priority in the field is an element to be considered it will not of itself govern the granting of a certificate of convenience and necessity for the operation of a motor-bus line. It will be noted also that the state of Illinois has unified control over all public utilities in its "Commerce Commission," and it is provided in that state that *no public utility* will be permitted to enter upon any new proposed service until it shall have obtained from the Commission a certificate that public convenience and necessity require it. This is the case in quite a number of other states of the Union. So, before fastening upon decisions from any of those states as authorities in determining the public policy of our state, as expressed in legislative enactments, we must take into consideration the fact that our legislature has seen fit to create a "Road Commission" in addition to the already existing Public Service Commission, and has endowed the former with power to pass upon the necessity of proposed bus lines between designated points and to issue certificates of convenience, if they deem the same "necessary or convenient for the public, and that the *service so proposed* to be rendered," etc. It is an attempt on the part of the state to control its highways, so that there may be ordered and regulated bus service over the same as among bus lines, and it excludes the idea of a legislative intent to establish a right of priority in favor of existing carriers by rail.

Even though it be admitted that the defendants in error have P.U.R.1928B.

a right of propriety to pre-empt the field of motor bus service, that right does not necessarily extend to their subsidiaries. These subsidiaries are separate and distinct corporate entities, possessing their own rights, powers, and duties. While the rail carriers perform their services under the limitation of their charters (transportation by rail), their subsidiaries only perform such service as they may obtain from the statute governing motorbus transportation. Such subsidiaries stand in the position of the ordinary applicant for a certificate of convenience. "The use of [them] the highways for the public transportation of freight and passengers belongs to the public. This use may, therefore, be completely regulated and controlled by the legislature in the interest of the public welfare," says this court in *Carson v. Woodram, supra*. There being no express or implied legislative policy in this state to support the doctrine of a property right in the railroad to priority over other competitors in motorbus transportation, the holding of this court in the several prohibition cases, and in the present cases, is an invasion of the legislative field.

Rehearing denied with modification October 26, 1927.

LOUISIANA PUBLIC SERVICE COMMISSION.

LOUISIANA PUBLIC SERVICE COMMISSION

v.

F. O. JOHNSON MOTOR FREIGHT LINES, INCORPORATED.

[No. 836, Order No. 464.]

Commissions — Jurisdiction to impose penalty — Illegal bus operation.

1. The Louisiana Public Service Commission has jurisdiction under an act (292 Laws of 1926) and the State Constitution (§ 4, Article VI) to order an individual accused of operating as a public motor utility without a certificate to appear and show cause why the penalty should not be imposed upon it, p. 176.

Certificates of convenience and necessity — Penalty for illegal operation — Automobiles.

2. A citation of the Commission ordering an automobile freight P.U.R.1928B.

carrier to appear and show cause why the penalty should not be levied upon him for illegal operation was held sufficient, notwithstanding a contention that, because of its penal character it was required to allege the detailed information regarding the nature and cause of the accusation or the facts surrounding it, p. 176.

Public utilities — Test of status — Effect of solicitous advertising and corresponding — Motor carriers.

3. The advertisement of a motor freight carrier in a telephone directory and correspondence soliciting business are not absolute proof of the public utility status of the carrier as defined by the law (Act No. 292, Louisiana Laws of 1926) but they are strongly persuasive that the carrier holds itself out and actually does perform motor transportation service available to the public at large, p. 178.

Certificates of convenience and necessity — Penalties for illegal operation — Motor freight utility.

4. Evidence having established that a motor freight carrier was illegally operating without a certificate of convenience and necessity, the Attorney-General of the state of Louisiana was requested to bring suit for the collection of a penalty of one hundred dollars imposed upon the carrier by the Commission for such violation of the law (Act 292, Laws of Louisiana, 1926), p. 180.

[September 26, 1927.]

CITATION of motor freight operator to show cause why a fine should not be imposed for the violation of motor utility law in operating without a certificate of convenience and necessity; penalty of \$100 imposed.

Williams, Chairman: [1, 2] On July 20, 1927, the Commission on its own motion cited the respondent herein, F. O. Johnson Motor Freight Lines, Inc.,

“ . . . to appear before the Louisiana Public Service Commission, or such member thereof as may be duly designated by the Louisiana Public Service Commission to hear this proceeding, at the office of said Commission, in the State House, at Baton Rouge, Louisiana, on August 11, 1927, at 10 o'clock A. M., and then and there,

“To show cause, if any you have or can, why an order should not be entered by the Louisiana Public Service Commission imposing upon you a penalty of not less than one hundred dollars nor more than five thousand dollars for each and every day you have violated the rules and regulations of the Louisiana Public Service Commission adopted pursuant to and in conformity with P.U.R.1928B.

Act No. 292 of the legislature of Louisiana of 1926, by operating for hire and compensation a public service motor carrier between New Orleans, Louisiana and Baton Rouge, Louisiana, and intermediate points, over the highways of the state of Louisiana, and for transporting in said motor freight service freights and commodities, and charging, demanding, receiving, and collecting compensation for such transportation service, without first having secured from the Louisiana Public Service Commission a certificate of public convenience and necessity authorizing the operation of such public service motor freight line; and to further show cause why you should not be commanded and required to cease and desist from so operating the said public service motor transportation line until a certificate of public convenience and necessity authorizing you so to do has been issued to you by the Louisiana Public Service Commission, and for such other and further order or orders as the Commission may deem necessary and proper in the premises.

By order of the Commission, Baton Rouge, Louisiana, July 20, 1927.

Henry Jastremski,
Secretary."

Under proper resolution, Chairman Williams was authorized to take testimony therein and his findings and recommendations are set out in this opinion and order.

Respondent excepted first to the jurisdiction of the Commission, and counsel for the respondent further excepted to any further proceeding herein "for the reason that this is, in form and substance, a penal action; that the averments of the rule taken against respondent are uncertain, vague, and indefinite, and present not facts, but merely a recitation of the conclusions of the pleader; that respondent is, in such a penal action, entitled to be informed of the nature and cause of the accusation against respondent, and is, therefore, entitled to a bill of particulars herein disclosing the facts of the alleged acts on the part of respondent because of which it is sought to impose a penalty upon respondent, in order that respondent may thereupon inquire into and investigate said alleged facts and cause to be summoned

its own witnesses to whatever may be the subject matter depended on by the prosecution under the rule herein taken."

Both exceptions are overruled. The citation herein is in our opinion full and complete and legally adequate. The evidence shows conclusively that respondent has been operating a freight motor carrier between New Orleans, Louisiana, and Baton Rouge, Louisiana, as defined in Act No. 292 of 1926, without first obtaining a certificate of public convenience and necessity, all in violation of said Act No. 292, and the rules and regulations of this Commission adopted under the authority of said Act No. 292 of 1926, and § 4 of Article VI of the Constitution of the state of Louisiana.

[3] The record clearly negatives the contention that respondent is operating as a private carrier. Not only has the respondent failed to produce and file any such alleged private contracts, but there is affirmative evidence in the record that the respondent solicits and transports shipments indiscriminately for all who choose to patronize the service offered. There was filed in the record the summer and fall issue of the New Orleans directory of the Southern Bell Telephone & Telegraph Company. At page 137 thereof there appears a quarter page advertisement of the respondent announcing "daily motor freight service between New Orleans, Baton Rouge, and intermediate points on Jefferson Highway." The advertisement further directs attention to respondent's "regular rail freight rates with free pick-up and store door delivery." The telephone number of respondent is given, and there is no intimation anywhere in the advertisement that such service is performed only under private contract. A copy of respondent's tariff is in the record. It recites the points served by respondent and the rates charged on various commodities, as classified by the rail lines, Southern Classification, between such points. Respondent's rules and regulations are printed on the reverse of the tariff, and rule one reads:

"The minimum charge on one shipment from one consignee will be 50 cents."

The rules and regulations are a part of respondent's tariff, and it is difficult, if not impossible, to reconcile the rule just quoted with a contract of private carriage.

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There is in the record as "Bradford Exhibit 1," a letter from respondent, signed by its president, to one C. A. Ourso, at Donaldsonville, which we quote in full:

"F. O. JOHNSON MOTOR FREIGHT LINE
1155 Constance Street

Jackson 2133

New Orleans, La. 6/16

Mr. C. A. Ourso,
Donaldsonville, La.

Dear Sir:

Beg to acknowledge receipt of your letter June 15th, and in reply would say that we are operating daily between New Orleans and Baton Rouge and intermediate points along the Jefferson Highway.

Our rates are the same as charged by the railroad and our service includes pick-up and store-door delivery, which of course means a considerable saving to the shipper and consignee in terminal cartage.

Orders should read ship via F. O. JOHNSON MOTOR FREIGHT LINE, telephone Jackson 2133, 1155 Constance Street.

Trucks leave at 4 A. M. each day for places between New Orleans and Baton Rouge so that shipments can be delivered to your customer's store door early the next morning after the goods are shipped.

Very truly,

F. O. JOHNSON MOTOR FREIGHT
LINE

By, (Sgd.) F. O. Johnson."

It is true that neither the advertisement in the telephone directory nor the soliciting letter just referred to are proof in and of themselves that respondent has engaged in a public motor carrier service as defined by Act No. 292 of 1926 or by the rules of the Commission adopted thereunder, but they are strongly persuasive as leading to a conclusion that respondent holds itself out as and does actually perform a public motor transportation service available to the public at large. There are in the P.U.R.1928B.

record a number of duplicate freight receipts taken by respondent from consignees showing the delivery of consignments of freight; the weight of such shipments, the rate thereon, and the charges collected. These commodities include automobile fenders and other automobile parts, heaters, automobile tires, drugs, medicines, storage batteries, etc. Actual transportation for compensation of these commodities is admitted by respondent.

Respondent's president, while on the stand as a witness, testified that respondent had a contract with Standard Oil Company, of Louisiana, covering the transportation of oxygen and acetylene tanks, and other equipment of that nature. The traffic manager for the Standard Oil Company of Louisiana, on the witness stand, disputed this statement and testified that the only relations between his company and respondent were those such as existed between the company and other carriers—that no contract or contracts had been made other than mere shipping instructions by the Standard Oil Company of Louisiana to consignors in certain cases that shipments should be routed via F. O. Johnson Motor Freight Lines, Inc.

Respondent's president further testified that he solicited business and conducted his transportation operations in the same manner as do common carrier express companies.

[4] Beyond question, the F. O. Johnson Motor Freight Line is conducting a transportation business over the highways of Louisiana of such a nature and character as to bring the operations wholly within the provisions of Act No. 292 of 1926, and of the rules and regulations of this Commission adopted pursuant to said Act No. 292 of 1926, and beyond question they are operating in violation of said act. It is, therefore,

Ordered, that F. O. Johnson Motor Freight Lines, Inc., be and it is hereby commanded and required to forfeit and pay to the state of Louisiana the sum of \$100 for violating the order of this Commission, of date December 29, 1926, prescribing rules and regulations for the transportation of persons and property by motor carriers as defined in Act No. 292 of the legislature of Louisiana of 1926, and the Attorney-General of the state of Louisiana is hereby requested to bring suit for the col-
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lection of the penalty herein imposed, in accordance with law; and it is further

Ordered, that F. O. Johnson Motor Freight Lines, Inc., be and it is hereby notified, required, commanded to cease and desist from further operating a public motor carrier on, over or along the highways of the state of Louisiana, as such motor carrier is defined in Act No. 292 of the legislature of Louisiana of 1926, unless and until it has been authorized to so operate by this Commission according to law.

LOUISIANA PUBLIC SERVICE COMMISSION.

EX PARTE WILLIS DAWSON.

(No. 865, Order No. 470.)

Certificates of convenience and necessity — Operation prior to regulation — Burden of proof.

An applicant for a certificate of convenience and necessity seeking the protection of a law (Act 292, Louisiana Laws of 1926) providing for the automatic issuance of a certificate to applicants operating in good faith prior to the passage of the act has the burden of affirmatively establishing that his previous operations were of the same character, on regular schedule, and between the same termini as those contemplated by his application.

(LONG, Commissioner, dissents.)

[November 11, 1927.]

APPLICATION for a certificate of convenience and necessity to operate a public service motor vehicle; application dismissed.

By the **Commission**: On September 16, 1927, Willis Dawson filed with this Commission his application for a certificate of public convenience and necessity, pursuant to the provisions of Act 292 of 1926, for a permit to operate a public service motor vehicle between Tallulah and Delta Point, Louisiana, a distance of some sixteen miles.

The Motor Transit Company, Inc., of Tallulah, Louisiana, holding a certificate from this Commission empowering it to operate a motor bus service over this route and between these P.U.R.1928B.

termini, protested the granting of the application, and the matter was heard before Chairman Williams at Baton Rouge on October 28, 1927, under a resolution of the Commission. His findings and recommendations form the basis of this order.

Willis Dawson in his application makes affidavit to the effect that he was operating, in good faith, a similar service to that for which he now seeks a certificate at the time of the passage of Act 292 of 1926, and it is urged that he is automatically entitled to such a certificate by operation of the act itself. Willis Dawson did not himself testify at the hearing, and the sole testimony offered in his behalf was that of his attorney. This testimony is far from being positive in any declaration that Willis Dawson at the time of the passage of said Act 292 was engaged in the same character of operations, on regular schedule, and between the same termini, as that contemplated by his application. It is true that there is no positive testimony before us to the contrary, but inasmuch as Willis Dawson seeks the protection of the act, the burden is upon him to affirmatively establish that he is entitled to it. He has not met this requirement.

Were there any complaints before the Commission charging that the service furnished by Motor Transit Company, Inc., over this route was inadequate and inefficient or that its equipment was not satisfactory, we would perhaps view with a less critical eye Willis Dawson's failure to establish his status at the time of the passage of the act. There are no such complaints of record, however, and no public interest demands the issuance of a certificate to Willis Dawson. It is, therefore,

Ordered, that the application of Willis Dawson for a certificate of convenience and necessity authorizing the operation of a motor bus line between Tallulah and Delta Point, Louisiana, be and the same is hereby denied and this proceeding dismissed.
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NEW YORK DEPARTMENT OF PUBLIC SERVICE
STATE DIVISION, PUBLIC SERVICE COMMISSION

RE LOCKPORT & NEWFANE POWER & WATER
SUPPLY COMPANY.

[Case No. 3606.]

*Security issues — Alleged increased value of land and water rights
— Power utility.*

1. An application of a power utility to issue additional securities by reason of an alleged greater value of its land and water rights was denied where the average normal flow of a stream, exclusive of surplus canal waters, was insufficient for the operation of the applicant's plant at full capacity and would not of itself justify any increase in such values over a previous allowance and where a fair construction of the State Conservation Law (Art. 10-a) did not permit the capitalization of licenses authorizing the diversion of surplus canal waters, p. 192.

*Electricity — Hydroelectric development — Permits to divert state
water power — State's policy.*

2. Licenses for the diversion of state water power are not granted wholly for the benefit of the licensees but pursuant to the policy of the state favoring the generation of low priced hydroelectric power to the public, p. 192.

[August 17, 1927.]

PETITION of power utility for authority to issue additional securities; denied.

Appearances: Warren Tubbs, for petitioner; George F. Thompson, president of petitioner; Mr. Karr Parker, consulting engineer of petitioner.

Pooley, Commissioner: Lockport & Newfane Power & Water Supply Company was organized by special act of the legislature, viz. Chap. 154 of the Laws of 1900, with an authorized capitalization of \$500,000, consisting of 5000 shares of stock of the par value of \$100 each. It acquired various parcels of real property and water rights in Eighteen-Mile Creek, in the town of Newfane, for the purposes of hydroelectric development and issued its entire authorized capital stock prior to July 1, 1907. It did not, however, develop its properties or operate as an electric company prior to its acquisition of the Middleport Gas & Electric Light Company and the Newfane Electric Company, pur-P.U.R.1928B.

suant to the orders of the Commission granted November 12, 1924, in Cases Nos. 2116, 2117, and 2118. It appeared in Case No. 2118 that all of the 5000 shares of the capital stock of the petitioner had been acquired in equal shares by Messrs. Knapp, Lewis, Thompson, Wheeler and Tracey, of Middleport, and that on January 22, 1924, they had entered into an agreement reciting, in substance, that all of the stock of the company had been issued; that it was necessary to finance the company; that the property owned by the company was of the value of \$150,000 of its capital stock; that the stockholders should retain that amount of stock, and that the remainder thereof, amounting to \$350,000 should be held in trust to be used for the benefit of the corporation. On November 12, 1924, the Commission granted an order authorizing the petitioner to execute and deliver a mortgage upon its properties and to issue \$300,000 face amount of 6 per cent bonds thereunder to be sold at 90, the proceeds to be used for new construction. For the purposes of that case the Commission placed a value of \$150,000 on the aforesaid land and water rights of petitioner, and the order further authorized the petitioner to issue 3895 shares of its common capital stock at par, for the following purposes:

(a) for land and water rights then owned by petitioner	\$150,000
(b) for the acquisition of the Middleport Company	136,500
(c) for the acquisition of the Newfane Company	103,000

This left 1105 shares of the original 5000 shares outstanding, which the Commission directed should be surrendered and cancelled, to be reissued only on the further order of the Commission. This order was accepted by the petitioner and the 1105 shares of its capital stock were actually surrendered and cancelled.

It might be added that the petitioner claimed in Case No. 2118 that all of its real property comprised a power site on Eighteen-Mile Creek, with flowage rights sufficient to permit of the construction of a dam 50 feet high and to produce approximately 3000 to 6000 horse power depending upon the flow of the stream, which, it was stated, varied from a minimum of 475 cubic feet per second to 750 cubic feet per second. It was claimed that there were no records in existence which would show the orig-

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inal cost to the company of the land and rights in question, and practically the only evidence of value in that case, other than the stockholders' valuation of \$150,000, was the assessment roll of the town of Newfane, showing an assessed valuation of \$30,000.

The petitioner has completed the construction of, and has in operation, its hydroelectric plant on Eighteen-Mile Creek and now applies for authority to issue further securities to discharge its obligations and for the reimbursement of its treasury for moneys expended from income for capital purposes. It also alleges that the value of its land and water rights acquired prior to 1924, is \$450,000, and asks that the Commission reconsider its former determination as to the value thereof and authorize additional securities to be issued therefor. It is this phase of the application that will be considered in this memorandum.

At the city of Lockport there is a drop of approximately fifty feet from the upper to the lower level of the barge canal. For many years this fall has been utilized by the Hydraulic Race Company for power purposes under a license from the state or other grants which permit it to pass water from the upper to the lower level of the canal. Eighteen-Mile Creek runs in a northerly direction from Lockport to Lake Ontario, a distance of approximately fourteen miles, with a drop of about 300 feet. Water has for many years been spilled into Eighteen-Mile Creek from the lower level of the canal, and this water, together with the natural run of the stream, is used by various manufacturing plants which, beginning at Lockport and extending down stream, are as follows:

Hydraulic Race Company, one plant.

United Paper Board Company, two plants.

Lockport Paper Company, one plant.

Niagara Paper Mills, one plant.

Tuscarora Hydraulic Company, two plants.

Electric Smelting & Aluminum Company, one plant.

Lockport Felt Company, two plants.

Lockport & Newfane Power & Water Supply Co., one plant.

The latter plant, which is that of the petitioner in this proceeding, is the last plant to use the water of the creek, and is located at Burt, about twelve miles from Lockport. The plant
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has static head of 50 feet and an installed capacity of 6,000 horse power. All of these plants are members of and control the Lockport & Newfane Mill Owners' Association, which holds a revocable permit issued by the superintendent of public works on November 25, 1913, authorizing it to take from the barge canal, at such points above and below the canal locks at Lockport as said superintendent may designate, not to exceed 500 cubic feet per second, out of the water carried down by said canal from Niagara river, subject to the right, however, reserved in the state to revoke and annul such permit at any time and to cause the association to cease the taking of water from the canal. This license provides for the payment to the state of \$7,500 per annum, subject to a pro-rata deduction based on the amount of water used or passed through. It appears that while said permit authorizes the association to take from the canal 500 cubic feet of water per second, the total amount of water which can be carried by the canal over and above that required for canal purposes, is 350 cubic feet per second, and that during the eleven calendar years from 1914 to 1924 inclusive, the water actually spilled was equivalent to a continuous carriage of only 265 cubic feet per second.

The New York Water Power Commission on June 3, 1926 issued a licence to United Paper Board Company, Lockport Paper Company, Niagara Paper Mills, Tuscarora Hydraulic Company, Electric Smelting & Aluminum Company, Lockport Felt Company, and Lockport & Newfane Power & Water Supply Company, to use the surplus canal waters which may be spilled into Eighteen-Mile Creek east of the Lockport locks within the city of Lockport, being all the canal waters not required for the needs of navigation. This license was granted pursuant to Chap. 579 of the Laws of 1921, as amended by Chap. 242 of the Laws of 1922, and Chap. 617 of the Laws of 1924, and as affected by Chap. 488 of the Laws of 1925. It calls for the payment to the state of an annual license charge of \$1,500 and is for the term of thirty years. The right is reserved in the state to temporarily draw off the water of the canal from time to time and to retake, recapture, and resume, wholly or in part, the use of the water and other property covered by the license as well as the right at any P.U.R.1928B,

time wholly to abandon or destroy the canal. It will be noted that the last mentioned license refers wholly to water spilled into Eighteen-Mile Creek east of, or below, the Lockport locks, while the revocable permit issued by the superintendent of public works applies to water taken from above and below the locks.

The Lockport & Newfane Mill Owners' Association, with its constituent members, applied to the Federal Power Commission for a license authorizing the diversion from the Niagara river through the barge canal of 500 cubic feet of water per second to be spilled down Eighteen-Mile Creek through the various plants of the members of the association. This application resulted in the granting of a license to divert 275 cubic feet of water per second, to be taken from the canal above the locks. It recited the granting of the revocable permit by the superintendent of public works, above set forth, and was made effective only for a period co-terminus with the state permit, not exceeding fifty years. It described the project works involved in detail, referring to the eleven separate developments above mentioned, and the development of the petitioner was set forth in the following language:

"Plant No. 11 Lockport & Newfane Power and Water Supply Company, consisting of reservoir, dam, and power house, already constructed, having a static head of 50 feet, more or less, and an installed capacity in water wheels of 3,200 horse power."

The authority to divert and use water is limited to the place, amount, manner, and agencies therein authorized, and it is expressly provided that neither said license nor any authority granted thereunder shall be deemed to place any obligation whatsoever on the state of New York with respect to the carriage or redirection of water, and further that if for any consecutive period of three years the average amount of water diverted from said canal, in accordance with the terms of the license, shall be less than 275 cubic feet per second, such average amount of water shall thenceforth be the quantity authorized to be diverted.

Subsequent to the granting of this license the petitioner installed another unit and its power plant is now fully constructed and in operation. It consists of a dam approximately 340 feet long, with a storage pond approximately two miles long, with a

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storage capacity of about twenty-one million cubic feet on a draw down of $5\frac{1}{2}$ feet. The power house contains two 1250 kilovolt amperes water wheel generators each direct connected to a 1670 horse power turbine, which were completed and put in operation in the month of February, 1925, and one 2500 kilovolt amperes water wheel generator direct connected to a 3000 horse power turbine which was completed and put in operation in the month of October 1926.

The normal or average flow of the stream, including water from all sources, is not sufficient to permit of the operation of this plant at full capacity continuously, the plant having been designed to operate on a peak load basis during certain periods of the day, which operation necessitates the utilization of more water than the average flow of the stream will support and calls for the drawing down of the storage pond from time to time. With the entire plant in operation the average power generated for the five months from November 1926 to March 1927, inclusive, was 907,500 kilowatt hours per month under an average operating head of 47 feet.

The petitioner asks that a valuation of \$450,000 be placed on its lands and water rights, instead of \$150,000 heretofore allowed by the Commission. To substantiate this valuation it called as a witness Mr. Karr Parker, a consulting engineer, who testified that for a period of about eight years he was employed as consulting engineer by the Lockport and Newfane Mill Owners' Association and designed all of the power plants on Eighteen-Mile Creek; that during that time observations were made of the flow of the stream; that the natural flow thereof, exclusive of canal waters, varied from a minimum of 166 cubic foot second to a maximum in excess of 800 cubic foot second, and that the average run-off at Burt was 263 cubic foot second, exclusive of any Federal license or surplus canal waters.

Mr. Parker assumes that the water now being discharged from the lower level of the canal will be reduced if and when water is diverted from the upper level thereof and reaches a total average run-off at Burt of 663 cubic foot second by adding to the normal run-off of the creek 275 cubic foot second, authorized to be diverted by the Federal license from the upper level, and P.U.R.1928B.

126 cubic foot second which he assumes will still be spilled from the lower level. However, the construction work which the upper diversion will necessitate has not been undertaken, and no water is as yet available from that source. Neither does the Federal license impose any obligation on the state of New York, but expressly provides that the carriage of water, and the time, place, amount, and manner of diversion thereof, shall be wholly within the option of the state. The total carrying capacity of the canal, in excess of waters necessary for navigation, is 350 cubic foot second, but for many years the amount spilled has averaged only 263 cubic foot second, and there is nothing in the record to indicate that such amount will be increased.

Mr. Parker assumes a gross annual income of \$136,950, and after deducting estimated operating charges amounting to \$25,536, arrives at a net annual income of \$111,414 which, capitalized at 8 per cent, is equivalent to an investment of \$1,392,675. The cost of construction of the plant is said to be \$443,440.37 which would leave \$949,234.63 applicable to the value of the aforesaid lands and water rights. He testified that there were two separate and distinct demands on the plant for power, one being the distribution system of the petitioner, which he said would use 40 per cent of the power generated, and the other being the system of the Niagara, Lockport & Ontario Power Company.

He assumed in his calculations that the plant would be operated at full capacity practically on a peak-hour basis, 82 per cent of all power generated being treated as first-class power and only 18 per cent thereof as second-class power; the average flow of 663 cubic foot second; 62 per cent over all plant efficiency, and an average static head of 49 feet. He placed a value of $7\frac{1}{2}$ mills per kilowatt hour on first-class power, and $4\frac{1}{2}$ mills per kilowatt hour on second-class power. While the plant is most admirably adapted, both as to location and design for peak load operation, Mr. Parker's computations would appear to be optimistic, based as they are on ideal maximum conditions as to plant efficiency, load factor, available water supply, static head, and price, all of which, in any computation; are most important elements, the slightest change in which would ma-
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terially alter the result. A plant efficiency over all of 82 per cent, while possible, would seem to be high, as would a load factor which contemplates the operation of the plant at full capacity for twelve hours when the distribution system demands 40 per cent of all power generated and furnishes continuous twenty-four-hour service.

The available water supply has already been discussed. Water is not now available under the Federal license, and the present average flow of the stream is not equivalent to 663 cubic foot second. A static head of 49 feet is assumed, while the plant appears to be operated under an average static head of 47 feet.

The value of first and second-class power is based upon a stand-by or interchangeable contract made between petitioner and the Niagara, Lockport & Ontario Power Company which gives the latter company the privilege of purchasing surplus power from the petitioner but in no way obligates such purchase. It has, however, taken large quantities of power under the contract, by the terms of which all power delivered from 7 A. M. to 7 P. M. on week days, except Saturdays and holidays to the number of six per year, and on Saturdays from 7 A. M. to 12 noon, is first-class power, at $7\frac{1}{2}$ mills per kilowatt hour, and all other power is second-class power, at $4\frac{1}{2}$ mills per kilowatt hour.

Mr. Parker assumes the factors above referred to and estimates a daily production of 54,112 kilowatt hours, a total production per year of 19,750,660 kilowatt hours. He distributes this total estimated production between first and second-class power and computes his net annual income as follows:

All power supplied to the Niagara, Lockport & Ontario Power Company on Mondays, Tuesdays, Wednesdays, Thursdays, and Fridays, 7 A. M. to 7 P. M., and on Saturdays, 7 A. M. to 12 noon is first-class power except power delivered on holidays (6 holidays in a year). Power delivered to the Lockport & Newfane Power & Water Supply Company at all times (an average 24-hour load of 500 kilowatts) is first-class power sold at 7.5 mills per kilowatt hour.

All other power is second-class power sold at 4.5 mills per kilowatt hour.

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First class power—

255 week days @	54112 k.w.h.	13798560 k.w.h.
52 Saturdays (5 hrs. @ 4500 k.w.)	22500 k.w.h.	1170000 "
52 Saturdays (19 hrs. @ 500 k.w.)	9500 k.w.h.	476900 "
58 Sundays and holidays (24 hrs. @ 500 k.w.)	12000 k.w.h.	696000 "
Total		16141460 "
		7.5 mills

Total gross value of first class power \$121,060.95

Second class power—

Total kilowatt hour production per year	19750880 k.w.h.
Less first class power (above)	16141460 "
	3609420 "
Less extra second class power losses	78520 "
Net second class power	3530900 "
	4.5 mills

Total gross value of second class power \$15,889.05

Total gross value of first and second class power \$136,950.00

Operating charges 25,536.00

Net annual revenue \$111,414.00

It would seem that even if the water authorized to be diverted under the Federal license were available, Mr. Parker's estimate of the amount of power that could be generated is excessive and would also be affected by factors other than those before referred to. The ratio between maximum and minimum daily run-off is very much in excess of 2 to 1. Periods of low water would reduce the amount of first class power that could be generated, while periods of high water would probably only serve to increase the quantity of second class power.

With an average run-off from all sources of 663 cubic foot second, and a normal run of stream of only 263 cubic foot second it will be seen that the water brought down in the canal and spilled at Lockport plays a most important part in the operation of the plant of petitioner at Burt. Mr. Parker assumes that 400 cubic foot second will be diverted from the canal. That amount, however, is not as yet available and probably never will be, but if it were the fact remains that the state of New York has reserved in itself not only the right to license and regulate the use of such water but to regulate the generation, distribution, and sale of power generated therewith, as P.U.R.1928B.

well as to regulate the service, capitalization, and secured debt of the licensee and licensed project.

[1, 2] The average normal flow of Eighteen-Mile Creek, exclusive of surplus canal waters, is insufficient for the operation of the plant at full capacity and would not of itself justify any increase in the value of the lands and water rights involved over the allowance heretofore made. It is apparent that the constructed plant of petitioner must depend upon surplus canal waters for successful operation and that this application amounts to a suggestion that the licenses or permits heretofore granted authorizing the diversion and use of such waters be capitalized. A fair construction of the provisions of Article 10-a of the Conservation Law does not permit of this. Licenses are not granted wholly for the benefit of the licensees, but pursuant to the policy of the state favoring the generation of low priced hydroelectric power to the public. For these reasons the application of the petitioner for authority to issue additional securities by reason of an alleged greater value of its land and water rights, should be denied.

All concur.
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MISSOURI PUBLIC SERVICE COMMISSION.

CITY OF LEE'S SUMMIT
v.
INDEPENDENCE WATERWORKS COMPANY.

[Case No. 5307.]

Commissions — Jurisdiction over legal questions relating to contract.

1. The Commission is not authorized to pass upon the validity of a private contract with a view of rendering a judgment specifically enforcing the same, p. 199.

Commissions — Jurisdiction and powers in general.

2. The Commission is an administrative agency assigned to the executive department and its powers are defined by the law of its origin, p. 199.

Service — Commission limitations — Effect of contract on water supply.

3. The Commission must decide a complaint by a municipality against a water utility for an insufficient supply from the evidence and the facts that are applicable, and it cannot be governed by the terms of a contract between the parties, p. 199.

Service — Water utility — Waiver of contract.

4. A utility whose service contract has been waived at its request by the Commission for the purpose of increasing its rates to allow it a fair value cannot thereafter insist upon strict observance if the Commission in an effort to render justice to the consumers on a complaint is forced for the second time to disregard the express terms of the contract, p. 199.

Service — Duty to serve — Contract — Water utility.

5. A utility voluntarily signing an agreement to furnish water to a municipality and entering the field assumes the burden placed upon it by law to give adequate service (§ 10477 Revised Statutes of Missouri 1919), p. 200.

Service — Duty to serve — Relative right of adequate service and fair return — Water utility.

6. Adequate service is as much a corollary to fair rates of return as is the right to demand a fair rate of return for service rendered, p. 200.

Service — Water utility — Municipal booster pump.

7. A utility supplying water to a municipal reservoir, upon complaint of the municipality of insufficient supply, was ordered to take immediate action to relieve the complainant of further expense in the operation of a booster pump with which the latter had attempted to maintain a sufficient supply, p. 200.

[November 19, 1927.]

COMPLAINT of a city against a waterworks company for insufficient supply; service ordered improved.

Porter, Commissioner: This case is before the Commission upon the complaint of the city of Lee's Summit, Missouri, hereinafter called the complainant, against the service of the Independence Waterworks Company, a private corporation with offices in Independence, Missouri, and hereinafter called the defendant. A formal hearing was held on August 10, 1927 by a member of the Commission at the Court House in Independence, Missouri. At this hearing the complainant was represented by Mr. E. S. Bennett of Lee's Summit, Missouri and the defendant by Mr. A. N. Gossett and Mr. Rufus Burns, both of Kansas City, Missouri.

The complaint gives a short history of the negotiations whereby the complainant secured for its citizens water from the defendant. Said complaint alleges that on frequent occasions the complainant and the defendant were in sharp dispute about the failure of the defendant to furnish an adequate supply of water; that these disputes culminated in a formal hearing before the Public Service Commission; that the defendant was required by the Commission to furnish to the complainant an adequate supply of good clean water; that said defendant did furnish such supply until on or about July 1, 1925, when said complainant was compelled to install a booster pump in order to obtain sufficient water; that said booster pump was operated from said date until the present time; that said defendant had failed to furnish the necessary water to said booster pump so that in the two weeks preceding the filing of the complaint the water in the reservoir at Lee's Summit had decreased from a depth of 12 feet to a depth of 6 feet; and that by reason of this condition the complainant city is in danger of fire hazards, its sanitary conditions are in peril and its industries are threatened with severe loss.

The defendant in its answer admitted the general facts of the complaint in regard to the history of the case. Said answer however says that said defendant entered into a contract with the complainant to furnish water through its then existing 6-inch

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pipe line extending from its system in the city of Independence, Jackson county, Missouri, to Jackson county farm or home for the aged to the extent such 6-inch pipe line would suffice by certain pressure and subject to the use of water at such county institution. Said answer denies that the defendant is in any manner bound to maintain a booster pump on or in connection with its said pipe line and that it is under no obligation to maintain a higher static or gravity pressure in said pipe line at said county institution than as provided in said contract. Said answer further alleges that the defendant has at all times in respect to complainant complied with the provisions and terms of its contract to be by it performed and with all orders of the Public Service Commission in respect thereto; that said defendant delivers water to the complainant in accord with the terms of the contract; that owing to the increasing needs of complainant and its inhabitants complainant has, itself, for facilitating its receipt of water installed a booster pump on its own line; and that any deficiency or inadequacy, if any there be, of quantity of water received and used by complainant from this defendant is due either to the inefficiency of complainant's said booster pump or to its failure to operate same, or to complainant's failure and neglect to receive said water and store the same in its reservoir at Lee's Summit during the off-peak load periods of defendant's waterworks system, as in and by its said contract complainant agreed and is bound to do.

The Facts.

In 1911 Jackson county entered into a contract with the defendant to furnish water to the Jackson county farm or home for the aged, sometimes called the county hospital. Under the terms of this contract the defendant constructed a 6-inch pipe line from its waterworks system in Independence to said county farm. The cost of laying said pipe line was paid by Jackson county. Further under the terms of the contract the defendant was to pay the county court an annual rental of \$300 for the use of the pipe line in serving other patrons, this service, however, being subject to said defendant's obligation to furnish all P.U.R.1928B.

water that might be required at the county farm, aforesaid, an institution of about 3,400 people.

On or about November 2, 1915 the complainant and the defendant entered into a contract under the terms of which said complainant receives water from said defendant. A 6-inch pipe line was laid from the meter house in front of the county farm to a reservoir at Lee's Summit. This reservoir has a capacity of approximately 550,000 gallons and the standpipe which was constructed has a capacity of approximately 75,000 gallons. The reservoir was built of concrete and it has sloping sides with a depth of 14 feet and an outlet pipe 12 inches from the top which, therefore, gives a possible maximum depth of water of 13 feet. Under the terms of the contract, the defendant was to maintain a static gauge pressure of 80 pounds per square inch at the aforementioned meter house and the complainant was to receive water subject to the prior demands of the aforementioned county farm. Said contract also contained the rates to be charged.

The first complaint of a lack of water was filed in 1918 and was designated as Mo. P. S. C. Case No. 1717. The conditions were corrected and the complaint was dismissed.

In Mo. P. S. C. Case No. 1978, 7 Mo. P. S. C. R. 582, P.U.R.1919E, 599, the defendant made application for an increase in the rates set out in the contract. This increase was granted by order issued September 15, 1919.

In 1922 Mo. P. S. C. Cases No. 3409 (13 Mo. P. S. C. R. 134) and No. 3410 (13 Mo. P. S. C. R. 141), were filed with the Commission by the complainant in this case. The first case was a complaint in regard to the adequacy of the service and the second was an application for a reduction of the rates to be charged to those set out in contract. The application for the reduction of rates was denied. In Case No. 3409, decided February 8, 1923, *supra*, the Commission suggested to the city of Lee's Summit that it repair the leaks which the evidence showed existed in the reservoir of said city. In the order in said Case No. 3409, *supra*, the Commission said: "Ordered: 1. That the Independence Waterworks Company be and it is hereby required to clean the meter through which it delivers water to P.U.R.1928B.

complainant at least four times per year; that it operate its booster pump when such operation is necessary to deliver an adequate supply of water to complainant; and that it maintain a static pressure of 80 pounds per square inch on the 6-inch pipe line near the county hospital, as required by contract between parties herein." The booster pump mentioned in this order is a pump owned by the defendant in the present case and situated near the defendant's standpipe in Independence. The terms county hospital, county home and county farm are used interchangeably and all designate the same place. The county hospital designated in the above order is the same as the county farm heretofore mentioned in this report.

Following the above report conditions were again improved and the supply of water was adequate until the spring of 1925 when the supply again became inadequate to meet the demands of the complainant. There were conferences between the officials of the complainant and the defendant and as a result of these, the complainant installed about June 1, 1925 a booster pump at low point in the pipe line near the aforementioned county farm meter house and between said meter house and Independence. This booster pump was operated at irregular times dependent upon the depth of water in complainant's reservoir. It was testified in the hearing of the present case that at times, even though the pump was operated daily, the complainant would be unable to secure an adequate supply of water. More specifically it was alleged that during the month of July, 1927 and despite the constant use of the pump, the depth of water in the reservoir was reduced from 12 feet to 6 feet. Witnesses for the complainant further testified that the average monthly power bill for the operation of said booster pump was from eighty to eight-five dollars.

The use of water by both the complainant and the county farm has increased materially since the year 1915. It was admitted by the complainant that the number of customers in Lee's Summit had increased from about 150 to 360 and that the average consumption of water had increased from 25,000 to 30,000 gallons daily to 40,000 to 60,000 gallons. It was shown that complainant's average daily consumption for the month of

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July, 1927 was 70,000 gallons and for the period from July 14, 1927 to August 9, 1927 inclusive 60,360 gallons. At the county farm it was shown in Case No. 3409, *supra*, that the average daily use for the month of July, 1922, was 60,000 gallons and it was shown in the present case that for the month of July, 1927 the average daily use was 82,000 gallons and for the period July 14, 1927 to August 9, 1927 inclusive 96,740 gallons. The comparison of these figures is of course subject to such modifications as may be brought about by a wet or dry season. In addition to the above use of this 6-inch pipe line there are several customers between the county farm and Independence whose combined daily consumption averages approximately 10,000 gallons. It was further shown by the defendant that there were many days in July, 1927 when the county farm received over 100,000 gallons.

The figures of the engineer for the complainant and of the engineer for the defendant do not agree as to the amount of water that would be available for the use of the complainant under varying demands of the county farm. These engineers however do agree that, in a protracted dry season with a daily consumption at the county farm of 90,000 to 100,000 gallons, there would not be without the aid of the booster pump an adequate supply of water for the inhabitants of the complainant city. In fact witness for the defendant testified that it is only a matter of time until it will be impossible to get water in adequate quantity for the increasing needs of the complainant and the county farm through the 6-inch pipe.

Witness for the defendant submitted automatic recording gauge charts which clearly indicate that defendant has maintained a static pressure of 80 pounds per square inch at the county farm.

It was testified that operation of a booster pump owned by the defendant and situated near its standpipe would furnish an adequate pressure to fill complainant's reservoir. Defendant's engineer protested the regular use of said pump for the alleged reason that it would place a greater pressure on defendant's entire system than that for which it was designed.

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Conclusions.

There were charges and counter charges by the parties in this case that the other was not giving full co-operation in the securing of an adequate water supply for complainant city. There was sharp contradiction in the testimony of the engineers employed by each side as to the supply that would be available, after serving the county farm and without the use of a booster pump, for the use of the complainant. The testimony of all witnesses and the check upon their figures by this Commission indicate very clearly that the present 6-inch pipe line will not of itself furnish by gravity an adequate supply of water to complainant during a period of maximum demand by the county farm. There was no testimony in the case that would indicate that the defendant did not have available at its Independence plant a supply of water adequate to serve the present and the probable increased future demands of the complainant.

The defendant in its answer and in its testimony has set up the contract entered into by it and the complainant, and alleges in its defense that it has fully observed all of the articles of said contract. The written contract aforementioned is free from ambiguity. It provides in plain terms that the defendant shall maintain a static gauge pressure of 80 pounds per square inch at the meter house near the county farm and that the complainant city shall only receive water after the demands of the county farm have been met. Thus, with the contract in view, the question is sharply defined: Do such contract provisions measure precisely the obligations and liabilities of the defendant touching the furnishing of an adequate water supply to satisfy the needs of the complainant?

[1-4] In prior decisions we have concluded that, as the Commission is not a court (*Macon v. Public Service Commission*, 266 Mo. 484, 181 S. W. 396; *Bevier Teleph. Co. v. Macon Teleph. Co. (Mo.)* P.U.R.1926A, 545), and its duties are not judicial (*State ex rel. Missouri S. R. Co. v. Public Service Commission*, 259 Mo. 704, 168 S. W. 1156), it is not authorized to pass upon the validity of a private contract with a view of re-

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dering a judgment specifically enforcing the same (*Sessinghaus v. St. Louis Merchants Bridge Terminal R. Co.* 2 Mo. P. S. C. R. 690, P.U.R.1916B, 1004). This Commission is assigned to the executive department, and is, therefore, an administrative agency (*Michigan C. R. Co. v. Michigan R. Commission*, 236 U. S. 615, 59 L. ed. 750, P.U.R.1915C, 263, 35 Sup. Ct. Rep. 422; *Brotherhood of Locomotive Firemen and Enginemen v. St. Louis & S. F. R. Co.* 2 Mo. P. S. C. R. 560, P.U.R.1915F, 489), and its powers are defined by the law of its origin. The Commission must decide this cause from the evidence and the facts that are applicable to said cause and it can not be governed by the terms of said contract. Having accepted the order of the Commission in Mo. P. S. C. Case No. 1978, 7 Mo. P. S. C. R. 582, P.U.R. 1919E, 599, where the justice of defendant's claims were recognized and the rates were raised above those set out in the contract, the defendant company should not now be found to complain when the Commission, in its efforts to render justice to the consumers, is forced for the second time to disregard the terms of the contract.

[5-7] The Commission finds from the evidence that the defendant voluntarily signed an agreement to furnish water to the complainant. Having entered the field there was placed upon it by law the obligation to give adequate service (§ 10477 Revised Statutes of Missouri 1919, *Banks Commercial Club v. North Coast Power Co. (Or.)* P.U.R.1924B, 70; *Re Canon-Reliance Coal Co. (Colo.)* P.U.R.1922B, 139). The evidence further shows that the service has proven inadequate to serve the growing needs of the complainant city. Adequate service is as much a corollary to fair rates of return as is the right to demand a fair rate of return for service rendered. (*Re Milwaukee Electric R. & Light Co. (Wis.)* P.U.R.1920A, 361). The Commission is, therefore, of the opinion that the defendant should take immediate steps, either by the installation of a booster pump or by the laying of a larger or separate pipe line, to serve the present and growing needs of the complainant city. The Commission is of the further opinion that the defendant should take such immediate action as will relieve the complain- P.U.R.1928B.

ant of further expense in the operation of said complainant's booster pump.

An order in keeping with the above will issue.

Brown, Chairman, Ing, Calfee, Commissioners, concur;
Hutchison, Commissioner, absent.

NEW JERSEY BOARD OF PUBLIC UTILITY COMMISSIONERS.

JOHN J. SULLIVAN

v.

ROCKLAND ELECTRIC COMPANY.

Rates — "Room rate" demand charge — Electricity.

1. The "room rate" demand charge may be sustained as an endeavor to measure the demand element in the cost of operation by some simple and easily understood rule and to distribute the cost of extra equipment used during peak demand equitably among such consumers as make the most use of such equipment, p. 202.

Discrimination — Rates — Prejudice to a few for greatest good — Electricity.

2. The prejudice to a small group of consumers necessarily resulting from a rate schedule effecting the consolidation of two or more classes of service should not be allowed to stand in the way of an otherwise desirable form of rate schedule where it is not unreasonable and beneficial to the large majority, p. 203.

Rates — Reasonableness — Burden of proof — "Room rate" demand charge.

3. Protestant against a "room rate" demand charge for electric service did not sustain the burden of proof to support his contention that rates were misleading, inequitable, and discriminatory where only 24 consumers had higher bills as against about 4,000 benefited by the change, p. 203.

[December 1, 1927.]

COMPLAINT of consumers against the adoption of a "room rate" demand charge for electric service; dismissed.

Appearances: John J. Sullivan for petitioner; Robert Carey for respondent.

By the Board: Mr. Sullivan addressed a communication to the Board formally protesting against the new schedule of rates P.U.R.1928B.

recently filed with the Board (proposed to become effective November 1, 1927) on the ground that said schedule is founded upon an arbitrary and unreasonable basis and that the rates proposed to be charged under it are misleading, inequitable, and discriminatory.

The company's new schedule of rates entitled Service Classification No. 1, applicable to yearly service in private residences only for lighting, heating, cooking, motors of 2 horsepower or less, is as follows:

First	5 kw. hrs. per room per month	13¢ per kw. hr. net
Next	3 kw. hrs. per room per month	10¢ per kw. hr. net
Over	3 kw. hrs. per room per month	4¢ per kw. hr. net
Minimum monthly bill \$1.		

In support of his complaint Mr. Sullivan testified that the new rate was discriminatory for the reason that for a given consumption a customer with a small number of rooms would have smaller blocks at the 13 cent and 10 cent blocks than would the customer with a large house, and claimed that a schedule based on floor area would be more reasonable.

The complainant submitted Exhibit P-1, prepared by the Rockland Electric Company which shows the cost of service to him at his residence under the old schedule on a partly estimated basis, and under the new schedule on the basis of a residence containing from six up to twelve rooms, inclusive. The cost under the old schedule for the year ending September, 1927, would be \$112.05. The company's "real estate count" of the rooms in Mr. Sullivan's residence was seven, for which the annual comparable bill would be \$107.49.

If *all* costs of an electric company accrued in strict proportion to the number of kilowatt hours consumed, the complainant's contention might be reasonably maintained, but costs do not accrue in this way.

[1] Capacity or demand costs vary with the demand each customer makes on the plant and system of the company with due regard to diversity of use, but do not vary in proportion to current used. These costs are incurred by the company whether the customer used the capacity devoted to his use one day or three hundred sixty-five days a year. Nearly all electricity now distributed for sale for residential and commercial use is alternat-

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ing current and cannot be stored. For this reason the utility must have equipment to meet the instantaneous demands for current. If the customer makes a short-time use of this equipment to supply his demand, this carrying costs must be distributed over a relatively small number of units (kilowatt hours) of electricity and the resulting average rate, to be compensatory, must be high. Conversely, if the customer makes long hour use of such equipment his average rate is and should be smaller by reason of the fact that the carrying cost of equipment is distributed over such larger number of units used. This is fundamental and reasonable. The filed schedule attempts to measure this demand on the basis of the average residential occupied room.

The rate questioned by the complainant is the result of an endeavor to measure the demand element above referred to by some simple and easily understood rule. The reasonableness of this form of rate was approved by this Board in *Re Shapiro*, revised schedule of rates for electricity of the Consolidated Gas Company of New Jersey (XI N. J. P. U. C. R. 133, especially p. 136, P.U.R.1923E, 116); vide also *Re Minimum Monthly Charge for Lighting Service* (I N. J. P. U. C. R. 235, 239) as to basis for rates. The United States District Court for Western New York has just handed down a decision in *United States Light & Heat Corp. v. Niagara Falls Gas & E. L. Co.* 23 F. (2d) 719, P.U.R.1927E, 749, holding in substance that a gas company has a constitutional right to furnish service at fair rates and that its consumers have a constitutional right to be served at fair rates; that a rate schedule which permits a certain group of consumers to be charged more than their just cost of service is unfair discrimination against them; that a flat or straight meter rate is condemned.

[2, 3] In any revision of rate schedules, especially when such schedules effect a consolidation of two or more classes of service into one schedule, there may be some customers who suffer prejudice thereby, but if this prejudice be not unreasonable and the greatest good is afforded to the greatest number, such prejudice should not stand in the way of an otherwise desirable form of rate schedule. In this particular instance the testimony in P.U.R.1928B.

dicates that but 24 customers will have higher bills while upwards of four thousand will be benefited by composite reduction in charges approximating \$20,000, and that costs are reasonably allocated. All customers taking lighting service alone will have decreased bills.

In the Board's opinion, Mr. Sullivan has not sustained the burden of proof to indicate the contention that the rates under the schedule complained of are misleading, inequitable, and discriminatory.

The Board, therefore, finds and determines that the complaint with respect to the schedule complained of should be and is hereby dismissed.

PENNSYLVANIA PUBLIC SERVICE COMMISSION.

BOROUGH OF KNOXVILLE

v.

SOUTH PITTSBURGH WATER COMPANY.

[Complaint Docket No. 6257.]

BOROUGH OF GREEN TREE

v.

SOUTH PITTSBURGH WATER COMPANY.

[Complaint Docket No. 6278.]

BOROUGH OF MOUNT OLIVER

v.

SOUTH PITTSBURGH WATER COMPANY.

[Complaint Docket No. 6279.]

BOROUGH OF DORMONT

v.

SOUTH PITTSBURGH WATER COMPANY.

[Complaint Docket No. 6280.]

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BOROUGH OF CARNEGIE
v.
SOUTH PITTSBURGH WATER COMPANY.
[Complaint Docket No. 6282.]

BOROUGH OF CARRICK
v.
SOUTH PITTSBURGH WATER COMPANY.
[Complaint Docket No. 6285.]

CITY OF PITTSBURGH
v.
SOUTH PITTSBURGH WATER COMPANY.
[Complaint Docket No. 6286.]

BOROUGH OF CRAFTON
v.
SCUTH PITTSBURGH WATER COMPANY.
[Complaint Docket No. 6288.]

BOROUGH OF INGRAM
v.
SOUTH PITTSBURGH WATER COMPANY.
[Complaint Docket No. 6289.]

BOROUGH OF OVERBROOK
v.
SOUTH PITTSBURGH WATER COMPANY.
[Complaint Docket No. 6290.]

J. RHODES MILLER
v.
SOUTH PITTSBURGH WATER COMPANY.
[Complaint Docket No. 6291.]

TOWNSHIP OF MIFFLIN

v.

SOUTH PITTSBURGH WATER COMPANY.

[Complaint Docket No. 6292.]

BOROUGH OF BRENTWOOD

v.

SOUTH PITTSBURGH WATER COMPANY.

[Complaint Docket No. 6293.]

BOROUGH OF ROSSLYN FARMS

v.

SOUTH PITTSBURGH WATER COMPANY.

[Complaint Docket No. 6294.]

H. H. WOLFE

v.

SOUTH PITTSBURGH WATER COMPANY.

[Complaint Docket No. 6295.]

BOROUGH OF BRIDGEVILLE

v.

SOUTH PITTSBURGH WATER COMPANY.

[Complaint Docket No. 6298.]

Valuation — Bond discounts — Brokerage — Construction.

1. The entire amount of bond discount and brokerage should not be permitted to be capitalized on the books, but the proportion of such discount and brokerage which the construction period bears to the life of the bonds should be capitalized in the same way as interest during construction, and the balance should be amortized out of income during the life of the bonds, p. 210.

Valuation — Property used and useful — Stand-by equipment — River crib for filtration plant.

2. A river crib used by a water utility for the purpose of getting a clear supply of water from beneath the river bed, upon a showing that it had served its entire useful life, was included in the reproduction cost estimate at a value of \$5,000, over the objection of the utility that it was still theoretically useful at \$37,322, the valuation of the Commission being for a second-hand facility, p. 211.

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Valuation — Property not useful — Ash conveyor of water utility.

3. The Commission excluded from the reproduction cost estimate of a water utility the value of an ash conveyor upon a showing that, owing to a change of plant routine, the appliance had been unused for six years, p. 212.

Valuation — Rate making — Reproduction cost estimate — Modern construction economies.

4. Any savings which would result from the use of less expensive construction under present day conditions should be reflected in the finding of fair value rather than in the reproduction cost estimates, which should include the cost of reproduction of a structure as it exists, p. 212.

Valuation — Property useful — Parallel water mains — Competitive construction.

5. Parallel water mains, although originally constructed by competing utilities, were found sufficiently used by a utility possessing both systems as to be included in the reproduction cost estimate, p. 212.

Depreciation — Accrued and visible deterioration — Water utility.

6. Visible deterioration is not equivalent to the accrued depreciation of a public utility and the practice of computing depreciation by including the expense of repairs obviously needed was disapproved as insufficient, p. 213.

Valuation — Working capital — Methods of computing — Water utility.

7. A water utility's calculation of working capital based on average cash on hand and accrued charges and credits for a period of one year and complaining ratepayer's calculation of one month's operating cost were both disapproved in the case of a water company collecting service charges in advance and metered charges quarterly, p. 214.

Valuation — Working capital — Materials and supplies — Water utility.

8. An amount of \$40,000 was allowed as working capital to a water utility having a three-month operating expense of \$110,000 but receiving \$70,000 from service charges paid in advance, in view of \$24,766 worth of supplies on hand, meter charges being collected quarterly, p. 214.

Valuation — Nonphysical elements — Cost of financing — Water utility.

9. An item claimed by a water utility in the cost of financing was materially reduced where the company was not in fact financed on the basis of the plan claimed and the experience of the Commission indicated that the costs would not accrue to that extent, p. 214.

Valuation — Going value — Measures — Development cost — Water utility.

10. The developmental cost of the business is not equivalent to or synonymous with the going value of a public utility, the determination of which depends upon many circumstances, p. 214.

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Return — Operating expenses — Payment to parent company — Water utility.

11. An increase in the administration charge by a parent company from 84 cents per consumer to 3 per cent of gross revenue resulting in an annual increase of \$8,000 in the operating expenses of a water utility for the alleged purpose of dividing the charge among the controlled companies more equitably, was held not to yield sufficient advantages to the local company to warrant the additional payment and the amount was disallowed, p. 216.

Return — Operating expenses — Taxes — Water utility.

12. The amount of taxes claimed by a water utility, including state capital stock tax and Federal taxes, was lowered by the Commission's estimate, in view of the fact that such amount depended to some extent upon the income of the company, p. 216.

Depreciation — Annual depreciation — Water utility.

13. An allowance for annual depreciation claimed by a water utility was raised by the Commission in view of the fact that the item had been based upon an estimate of accrued depreciation which had been disapproved and increased by the Commission, and the annual allowance was increased in proportion, p. 217.

Return — Percentage allowed — Water utility.

14. An increase of rates was allowed a water utility sufficient to yield a return of 7 per cent, p. 217.

Return — Operating expenses — Cost of rate proceedings — Water utility.

15. No allowance was made for the expense of a rate proceeding to a water utility where the services of a parent company in connection with the cost had been without charge and no testimony had been offered in support of the amount claimed, where additional revenues by way of rate increases prior to the proceedings had been sufficient to defray the expense, p. 218.

Rates — Service charge — Water utility.

16. Admitting the legality of the service charge, the Commission advised a consideration of the reduction of the charge, in view of considerable dissatisfaction among consumers who did not understand the justice of such basis of rates, p. 218.

[November 21, 1927.]

COMPLAINT of municipalities and ratepayers against increased water rates of respondent utility; complaint sustained and new schedule of tariffs ordered.

By the **Commission**: The present proceeding involves the rates charged by the South Pittsburgh Water Company under its tariff which became effective October 1, 1924. The respondent company supplies water to part of the city of Pittsburgh P.U.R.1928B.

and to a large number of smaller municipalities adjacent thereto. The tariff under attack made increases in the metered rates with no change in the former service charges or other rates. Its effect was to increase the annual cost of water from \$16.60 to \$19.60 to a consumer having a $\frac{5}{8}$ -inch meter on more than one outlet and using 30,000 gallons per year, with further increases to larger consumers.

Complaints were filed by various municipalities and individuals alleging that the rates were excessive, unjust, unreasonable and discriminatory. The respondent company in its answer denied these allegations and claimed that the new rates produced no more than a fair return upon the fair value of its property. Accounting and engineering investigations of the books and property of respondent company were made by representatives of the parties.

The original company in the territory supplied by respondent company was the St. Clair Water Company which began operations in 1895. As a result of the extensions by it, this company came into competition with the Monongahela Water Company. To eliminate such competition the Chartiers Valley Water Company was incorporated in 1896 and acquired ownership of the distribution system of the Monongahela Water Company in the territory where competition existed and obtained a lease of the property of the St. Clair Water Company for nine hundred and ninety-nine years. In 1903 the Chartiers Valley Water Company was faced with a demand from its consumers for a supply of filtered water. The company was unable to obtain the necessary money. Thereupon the South Pittsburgh Water Company and twenty-four paper companies were formed in the interest of the American Water Works & Guaranty Company, predecessor of the American Water Works & Electric Company, the present owner of the stock of these companies. The South Pittsburgh Water Company in 1904 obtained a nine hundred ninety-nine year lease of the property of the Chartiers Valley Water Company, including its lease of the property of the St. Clair Water Company. In 1913 the Whitaker Water Company was organized to supply Whitaker borough and has operated therein as a subsidiary of the respondent company. For the purpose of this

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proceeding, its property and revenue have been treated as if it were an integral part of respondent.

The territory served by respondent is known locally as "South Side" Pittsburgh. It consists of five wards in the city of Pittsburgh and twenty boroughs and twelve townships south of the Monongahela river. The territory is a growing suburban territory but is rugged and hilly. The territory served had a population of 157,294 in 1910 and 200,616 in 1920. There were 12,919 consumers in 1910, 21,210 in 1920, and 26,700 in 1924.

The source of supply of respondent is the Monongahela river from which water is pumped to a softening plant and a filter plant. After being filtered, the water is pumped directly into the distribution system. On the distribution system are six steel storage and distribution standpipes and a three million gallon stone-masonry reservoir. The filter plant has a total daily capacity of 20,000,000 gallons and is being operated at an average of about 60 per cent of capacity.

Respondent attempted to prove that the rates under attack produced no greater revenue than the company was entitled to receive. Various elements of fair value were introduced in evidence and contested by the complainants. All of the estimates were based upon property in existence on March 31, 1926, immediately prior to the hearings.

The respondent company had, on that date, outstanding bonds in the amount of \$4,538,000, preferred stock having a par value of \$706,000, and common stock having a par value of \$2,750,000. In addition, first mortgage bonds of the Chartiers Valley Water Company in the amount of \$473,000 were outstanding. The total par value of all the securities is \$8,467,000.

[1] Respondent claimed the original cost of property to be \$6,816,174. In this estimate is included working capital at \$110,000 and going cost at \$444,178. These items are not usually considered in statements of original cost as an element of fair value and will be dealt with separately in this report. Respondent's statement also includes an item of \$437,379 for bond discount. The systems of accounts prescribed by the Commission do not permit the entire amount of bond discount and brokerage to be capitalized on the book. In the most recent P. U. R. 1926B.

systems, the proportion of such discount and brokerage which the construction period bears to the life of the bonds is capitalized in the same way as interest during construction, and the balance is amortized out of income during the life of the bonds. Applying this method of calculation to this item of original cost, the Commission will include \$33,700 for this purpose. With these and some minor adjustments, the Commission finds that the original cost, exclusive of working capital and going cost, is \$5,838,215.

Estimates of historical cost were also offered in evidence. Respondent estimated that the historical cost was \$5,797,641. This estimate was only slightly in excess of that of complainants and is accepted by the Commission.

Both parties introduced in evidence estimates of reproduction cost of the property on the basis of prices at December 31, 1924. The final estimates, as revised at the hearings, covered property in existence December 31, 1924, with additions to March 31, 1926, at cost. Various corrections of the exhibits were made during the hearings and the final estimate of reproduction cost new, exclusive of cash working capital, going value, and cost of financing of respondent, was \$9,112,933, and of complainant was \$8,211,343. The estimates of cost of the various items as given by the respondent were generally based upon conditions in the locality involved and are in general accepted by the Commission.

The cost of trench excavation, forming a considerable part of the total cost, was based upon the use of manual labor. The complainants made some reference in the testimony to the saving in such cost which could be obtained by the use of trenching machines. No testimony was offered to show that the use of such machines was practical under conditions existing in this territory, nor the amount of saving which could be secured by their use. In fact, complainants' own estimate of reproduction cost was based upon the cost of digging trenches by manual labor. In view of the testimony, the Commission will estimate the reproduction cost of laying pipes on the basis used by the engineers of both parties.

[2] Respondent included in its estimates an item of \$13,832 P.U.R.1925P

for a river crib which was formerly used by that company for the purpose of getting a clear supply of water from beneath the river bed. It also included an item of \$37,322 for the cost of a pipe from this crib to its system. With the installation of the filtration plant the use of this crib was discontinued. Respondent claims that it is still useful for the purpose of getting water free from the cresote taste which occasionally occurs in the river because of the introduction of waste products from mills along its bank. This river crib had served its entire useful life. If respondent desires to resume its use for emergency purposes, it should be included in the valuation as a second-hand facility. The Commission will include it in the reproduction cost estimate at \$5,000.

[3] Respondent included an item of \$4,827 for a Hagan Ash Conveyor, formerly used for removing ashes from the boiler room of its Becks Run Station. Due to a change in the manner of handling the ashes, this appliance has not been used since 1921. The Commission will not include it in the reproduction cost estimate.

[4] Respondent included the Crafton stone-masonry reservoir at \$143,341. Complainants included this item at \$50,000 which was based on the cost of constructing a concrete reservoir. Complainants claim that the reservoir would not today be reproduced with the more expensive construction and that it should be included in the reproduction cost estimate at the amount which would actually be expended were a reservoir of equal capacity desired today. The reservoir was constructed in 1894 and there is no evidence that bad engineering judgment was used in the selection of the type of construction. The reproduction cost estimate should include the cost of reproducing the plant as it exists. Any savings which would result from the use of less expensive construction under present day conditions should be reflected in the finding of fair value rather than in the reproduction cost estimates.

[5] Complainants claim that a deduction from the reproduction cost estimate should be made because of the amount of parallel mains which exist in respondent's system. These parallel mains occur chiefly because of the competitive condition which

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existed between the Monongahela Water Company and the St. Clair Water Company prior to the formation of respondent company. Respondent claims that such parallel mains as exist are useful to their full extent. Regardless of the fact that they were originally installed for competitive purposes the record seems to support respondent's contention and the amount involved is comparatively small. They will be included in the Commission's estimate at their full reproduction cost.

From all the evidence the Commission finds that the reproduction cost new of respondent's physical property on the basis of prices for the year 1924, with additions to March 31, 1926, is \$8,990,000.

Respondent estimated the reproduction cost at average prices for a 5-year period and a 10-year period prior to December 31, 1924. No detailed estimate was given but the estimates were made by using index figures for costs as applied to the various kinds of property in respondent's plant. Its estimate for the 5-year period was approximately \$300,000 greater and its estimate for the 10-year period approximately \$500,000 less than the estimate based upon prices for the year 1924.

[6] Both parties agreed upon the determination of accrued depreciation by using the observation method, but they differed widely in the result obtained by such method. The method used by respondent consisted of observation of the physical condition of the property and measurements, where possible, of the amount of visible deterioration. Where no deterioration was visible, no depreciation was contained in the estimates. For instance, respondent claims that there is no visible evidence of the deterioration in its cast-iron pipes other than what can be removed by pipe cleaning, and estimates the depreciation at the cost of cleaning the pipe. It emptied its Crafton reservoir, which was constructed in 1894, and found that it was in good condition with the exception that a slight repair to its lining, was required, and estimated the depreciation at the cost of such repair. By the use of this method of computing depreciation the company estimated the depreciation in the entire property to be \$693,964. Visible deterioration is not equivalent to the accrued depreciation of a public utility property. The Supreme P.U.R.1928B.

Court of the United States in *Knoxville v. Knoxville Water Co.* 212 U. S. 1, 13, 53 L. ed. 371, 29 Sup. Ct. Rep. 148, has said: "A water plant, with all its additions, begins to depreciate in value from the moment of its use." The Commission finds that the accrued depreciation of respondent's property on March 31, 1926, was \$1,440,000.

[7, 8] Respondent's estimate included an item for cash working capital of \$110,000. This was based upon the average cash on hand and accrued charges and credits for a period of one year. Complainants' estimate contained an allowance of \$40,000 for this item which was based upon the estimated amount required to operate the company for one month. The Commission does not agree with either of these methods of determining the necessary amount of working capital. The respondent company collects its service charges in advance and its metered charges quarterly. It is obvious that sufficient working capital must be had for the purpose of meeting operating expenses during a 3-month period. The cash outlay for operating expenses for three months will approximate \$110,000. Against this it is estimated that approximately \$70,000 will be received from service charge collections paid in advance. This leaves about \$40,000 to be otherwise provided for. The Commission, therefore, concludes that \$40,000 cash working capital is a reasonable allowance, in view of the item of \$24,766 representing the stock of materials and supplies included in the reproduction cost estimate.

[9] Respondent included an item at \$391,651 for cost of financing. It based this upon a financing plan of $5\frac{1}{2}$ per cent bonds sold at 94 $\frac{3}{4}$ to the amount of 65 per cent of the value of its property; 7 per cent preferred stock sold at 95 to the amount of 15 per cent of such value; and common stock sold at par in the amount of 20 per cent of such value. The company is not in fact financed on that basis and the experience of the Commission indicates that such charges would not accrue to the extent claimed. The Commission will include in its estimates the sum of \$250,000.

[10] Respondent's estimate included an item of going value in the amount of \$575,000. Complainants estimated this P.U.R.1928B.

amount at \$330,000. The respondent's estimate was based upon an estimate of developmental cost of the business. It assumed that a new plant constructed to serve this territory would acquire 41.3 per cent of its gross earnings the first year, 76.5 per cent by the end of the second year, 95.3 per cent by the end of the third year, and 100 per cent by the end of the 4th year. On the basis of such earnings, respondent arrived at the present worth of the difference between the amount earned and a fair return upon the property in use. This amounted to \$576,687. The amount claimed by respondent is approximately 8 per cent of the fair value of its property and is approximately equivalent to the revenues for six months. The Commission does not agree that the developmental cost of the business is equivalent to or synonymous with the going concern value of a public utility property. The determination of such value depends upon many circumstances. In view of the history of the company, its method of operation, the character of its plant, its developmental cost, and other pertinent facts, the Commission finds that the respondent company has a going concern value, in addition to the value of the physical property, in the amount of \$500,000.

The elements entering into the finding of fair value described above may be summarized as follows:

Outstanding securities (par value)	\$8,467,000
Original cost (exclusive of cash working capital and going cost)	5,838,000
Historical cost (exclusive of cash working capital, cost of financing and going cost)	5,797,641
Depreciated reproduction cost at December 31, 1924 prices	8,340,000
Depreciated reproduction cost at 5-year average prices	8,640,000
Depreciated reproduction cost at 10-year average prices	7,840,000

Complainants claimed that the fair value of respondent's property is reduced because of an excessive pumping head to Chartiers Valley and by the existence of lean revenue districts in the territory served. No definite amount of money was claimed for these purposes. The Commission is not convinced that the lean revenue districts exist to any great extent or that their existence in these growing communities adversely affects the value of respondent's property. Concerning the alleged excessive pumping head, the record does not indicate that this is either unnecessary, improper, or imprudent, nor is the Commission convinced that the value of respondent's property is affected P.U.R.1928B.

thereby. From a consideration of all the evidence and taking into consideration the fact that prices of many items in the cost estimates have decreased since 1924 and that such decrease will probably continue for the next few years, the Commission finds that the present fair value of respondent's property is \$7,500,000.

The operating expenses of respondent company, exclusive of taxes and depreciation for the past several years have been as follows:

1919	\$268,445.90
1920	356,127.77
1921	305,295.97
1922	333,747.70
1923	332,016.35
1924	354,486.35
Year ending Sept. 30, 1925	408,123.69
Year ending March 31, 1926	419,746.00

[11] Respondent estimated that its operating expenses for the ensuing year, exclusive of taxes, depreciation, and amortization of cost of this rate proceeding, would be \$437,900. Part of the estimated increased expenses was due to an increase in the administration charge made by the American Water Works & Electric Company to the respondent company. This charge prior to January 1, 1926, was 84 cents per consumer. On that date, the charge was increased to 3 per cent of the gross revenues. This change in method of charging applied to all of the companies controlled by the holding company, and was made for the stated purpose of dividing the charge among the companies on a more equitable basis. The result as applied to the respondent company was to increase the administration charge approximately \$8,000 per year. The evidence does not disclose what additional advantage the respondent company will receive from the additional payment. The estimate by respondent also reflects the large increase in the cost of operation in 1925 above what had been spent in previous years. The Commission is not convinced that the expenditures for this purpose will be as great as are estimated by the respondent. The Commission finds that the proper operating expenses of respondent company will amount to \$426,000 per year.

[12] The amount of taxes claimed by respondent, exclusive P.U.R.1928B.

of the state loans tax and a mortgage covenant is \$62,499.33. These taxes include the state capital stock tax and Federal taxes. The amount of such taxes depends to some extent upon the income of the company. The Commission estimates the amount of such taxes at \$62,000 per year.

[13] Respondent's estimate contained an item of \$46,600 for annual depreciation. Complainants' allowance was \$36,632. The amount claimed by the respondent was based upon the amount of accrued depreciation contained in its estimate. It stated that a depreciation allowance of .8 per cent of the value of its property would have produced a sum equal to the accrued depreciation which respondent had found on the basis of visible deterioration. The Commission has stated above that the amount of accrued depreciation is considerably in excess of the amount stated by the respondent and it follows that the annual allowance necessary for the purpose is also in excess of respondent's claim. Considering this item in connection with its finding of accrued depreciation, the Commission finds that respondent company is entitled to an annual allowance for depreciation of \$105,000.

[14] The Commission finds that the fair return to the respondent company is 7 per cent of its fair value. The company is, therefore, entitled to charge rates which will produce the following sum:

7 per cent of \$7,500,000	\$525,000
Operating expenses	426,000
Taxes	62,000
Depreciation	105,000
Total	<u>\$1,118,000</u>

The operating revenue received by respondent for the past few years was as follows:

1919	\$538,493.15
1920	626,981.73
1921	678,984.26
1922	723,312.69
1923	807,153.47
1924	866,489.99
Year ending Sept. 30, 1925	1,047,398.13
Year ending March 31, 1926	1,079,103.22

Part of the large increase shown for the year ending September 30, 1925, was due to the increased rates which went into P.U.R.1928B.

effect October 1, 1924. Disregarding this exceptional condition, it appears that there is a normal increase of approximately \$50,000 per year in respondent's revenue due to the normal increase in its business. This statement of operating expenses given above indicates that the increase in revenue is not accompanied by an equal increase in operating expenses. The operating revenues for the year ending March 31, 1926, were \$1,079,103.22. From a consideration of the evidence, including the character of the territory served, the Commission estimates that the operating revenues of the company at present are on the basis of \$1,180,000 per year.

[15] Respondent estimated that the expenses of the present proceeding would amount to \$30,000 and claimed an allowance of \$10,000 per year for three years to amortize this expense. No charge is made to the respondent company for the services of the officials and employees of the American Water Works & Electric Company in connection with this case, and no testimony was offered to support the estimate of \$30,000. The revenues received since March 31, 1926, have probably been sufficient to take care of this item in its entirety. No additional allowance for that purpose will be made.

The Commission having found that respondent company is entitled to rates which will produce an operating revenue of \$1,118,000 and having estimated that the present revenues of the company are on the basis of \$1,180,000 an order will issue requiring the respondent to file a new tariff, effective January 1, 1928, on not less than five days' notice to this Commission and the public, calculated to produce under present conditions an annual operating revenue not in excess of \$1,118,000, accompanied by consumer data sufficient to determine the effect of the new rate.

[16] Complainants objected at the hearings to the service charge which is 50 cents per month for a $\frac{5}{8}$ -inch meter with one outlet, 83 cents per month for a $\frac{5}{8}$ -inch meter with two or more outlets, and higher charges for larger meters. Although the courts and this Commission have frequently sustained the legality of service charges when the basis thereof is reasonable, considerable dissatisfaction seems to be caused among consumers P.U.R.1928B.

who do not understand the justice of such basis of rates. The Commission suggests that respondent in filing this new tariff shall take into consideration the advisability of making a reduction in this item of its tariff.

An order will issue in conformity with this report.

SOUTH DAKOTA BOARD OF RAILROAD COMMISSIONERS.

**RE NORTHWESTERN BELL TELEPHONE COMPANY
et al.**

[Order F-1137.]

Apportionment — Telephone companies — Terminal fees — Statutory maximum.

A schedule of compensation for facilities furnished and services rendered in originating and terminating toll business should be based upon a commission per "sent-paid" and "received-collect" message instead of the uniform terminal fees, with a maximum of 5 cents for each message for incoming and outgoing toll messages, as provided by statute subject to change by the Commission.

[November 22, 1927.]

APPLICATION of telephone utilities for an order establishing a schedule of terminal fees for toll messages; schedule approved and present tariff discontinued.

Appearances: A. J. McBean, Counsel, for the applicants; L. W. Kridler, Manager, for the Fulton Telephone Company; Herbert Lound, Manager, for the Alpena Telephone Company; J. E. Wilson, Manager, for the Loomis Telephone Company; F. O. Alin, Manager, for the Fullerton Telephone Company; W. C. Harris, Manager, for the Citizens Co-operative Telephone Company.

By the **Board**: In this case the Northwestern Bell Telephone Company and the Dakota Central Telephone Company filed a joint application furnishing as a part thereof certain information as to the manner in which the toll business is conducted and alleging in part as follows:

"That pursuant to the interpretation which has generally been placed on § 9796 of the Revised Code of 1919, the compensation which has been and is now being paid by toll line companies to P.U.R.1928B.

companies operating connecting exchanges is 5 cents on each incoming toll message and 5 cents for each outgoing toll message.

"That the said compensation is unjust and unreasonable in the majority of cases, and that any uniform compensation which might be provided for originating and terminating toll messages would be unjust and unreasonable in the majority of cases for the reason that the amount of work performed by the exchange company necessarily varies with the character of the toll messages handled and with other variable factors.

"That the present method of computing said compensation is detrimental to toll operating efficiency in that it generally requires the making of two toll tickets on calls originating or terminating at exchanges of the companies with which connection is maintained."

We are requested to order the discontinuance of the practice of charging for incoming and outgoing toll messages uniform terminal fees with a maximum of 5 cents for each message, and to order substituted therefor the basis of compensation in conformity with a proposed schedule submitted with the application as follows:

Proposed Schedule of Compensation.

The commission determined in accordance with the following table will be full compensation for facilities furnished and services rendered in originating and terminating toll business.

Average Revenue per "sent-paid" and "received-collect" Messages.		Commission per "sent-paid" and "received-collect"
Over	But not Over	Message.
10.0¢	12.5¢	8.50¢
12.5¢	15.0¢	8.75¢
15.0¢	17.5¢	9.00¢
17.5¢	20.0¢	9.25¢
20.0¢	22.5¢	9.50¢
22.5¢	25.0¢	9.75¢
25.0¢	27.5¢	10.00¢
27.5¢	30.0¢	10.25¢
30.0¢	32.5¢	10.50¢
32.5¢	35.0¢	10.75¢
35.0¢	37.5¢	11.00¢
37.5¢	40.0¢	11.25¢
40.0¢	42.5¢	11.50¢
42.5¢	45.0¢	11.75¢
45.0¢	47.5¢	12.00¢
47.5¢	50.0¢	12.25¢
50.0¢	52.5¢	12.50¢
52.5¢	55.0¢	12.75¢

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The amount of commission payable each month for originating and terminating toll business at a given exchange is determined as follows:

(a) Compute the average revenue per "sent-paid" and "received-collect" message (not including messenger charges but including report charges).

(b) Ascertain from the foregoing table the commission applicable to such average revenue.

(c) Multiply the number of "sent-paid" and "received-collect" messages by the commission so ascertained.

The amount of commission due at each exchange at the end of each monthly billing period on the basis of the actual number of messages "sent-paid" and "received-collect" at that exchange during that period and on the basis of the average revenue per "sent-paid" and "received-collect" messages at that exchange during that period. If in any case the average revenue per message shall exceed 55 cents, the commission per "sent-paid" and "received-collect" message shall increase $\frac{1}{4}$ cent per 5 cents for the first 15 cents of such excess and $\frac{1}{4}$ cent per 10 cents for any remaining excess.

Upon notice served upon each toll line and exchange company operating in the state, the matter was set for hearing and heard at Mitchell.

The applicants offered testimony tending to show that the cost incident to the handling of incoming toll messages at an exchange is materially less than the cost in connection with the handling of outgoing messages and contended that a regulation requiring the payment of compensation of a similar flat rate is unreasonable and unjust; that the application of the basis of compensation as outlined in § 9796 of the Revised Code of 1919, from which we quote as follows:

"That all terminal fees for incoming and outgoing toll messages shall be uniform and the maximum charge on each incoming or outgoing toll telephone message shall not exceed 5 cents for any message originating or terminating in this state, unless otherwise ordered by the Board of Railroad Commissioners,"

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is not only unreasonable and unjust to the exchange company performing the terminal service, but is unduly and unnecessarily burdensome to both the toll line and connecting companies, inasmuch as under that method of determining the compensation to be paid it is necessary that a complete record be made of incoming as well as outgoing messages; that if the proposed schedule of compensation is authorized, the delays, insofar as the making of "in" tickets and the cost thereof is concerned, will be eliminated; and that while formerly the two-ticket method was in effect generally, the situation during recent years has completely changed and at the present time the one-way method has been generally adopted and is in effect in all of the states served by the applicants except in South Dakota where the flat statutory maximum rate has been observed. The witnesses for each of the applicants submitted figures to show that the compensation that would be paid to the exchange companies maintaining toll line connections with the applicants in the state of South Dakota would be greater than the compensation paid to such exchange companies upon the present or statutory basis. However, those witnesses testified that the increased compensation was justified and that the toll companies' net revenue would not be materially affected because of the decrease in operating costs and that the betterment of the service that would result would prove of value to both the toll line and exchange companies.

I. S. Burnett, manager of the Armour Telephone Company and president of the South Dakota Telephone Association, testified as follows:

"Q. You are manager of the Armour Telephone Company?

A. Yes sir.

Q. That is a connecting company of the Dakota Central?

A. Yes sir.

Q. What has been your experience with the two-ticket method of handling incoming calls?

A. I have done a little operating and ever since I learned they were using the single-ticket method I have been anxious to have it at Armour. I could see what saving in circuit and operating time it would give. Personally I think it is a crime
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to make both tickets. I think there could be so much quicker service given on single tickets that if the public realized it they would demand that the two-ticket method be abolished.

Q. You think it would be a distinct advantage to go on the single-ticket method?

A. I do.

Q. The only reason you know of for not doing so is the statutory basis of compensation?

A. That is the only thing. I have written the Dakota Central asking if the in-ticket couldn't be eliminated.

Q. How large an exchange have you at Armour?

A. About 600 phones.

Q. That includes service stations?

A. Yes sir. We have about 300 city phones. Our operators are very busy at the busy hours and in our case if we could eliminate those in-tickets it would be a great help.

Q. Do you think that would apply to others?

A. I think it would. I think the only stations that favor the retention of the two-ticket method would be those that have all kinds of time to make in-tickets which we haven't.

Q. There are some that because of traffic conditions the proposed scheme would give them a little less compensation and that might be a motive?

A. I presume that is the only one.

Q. Have you made any study as to what the Armour situation would be?

A. Yes sir. We would get more under the new schedule than the old, but I would state that if we got less I would still be in favor of it because the operators are heavily loaded.

Q. Would there be much increase?

A. About \$10 per month."

Representatives of certain exchange companies appeared and testified to the effect that while it might be a fact that the total compensation paid for terminal service by the toll line companies would be greater under the proposed method than paid under the application of the statutory rate, the actual compensation that they would individually receive would be less; that this more or less unusual situation would be brought about by P.U.R.1928B.

cause of traffic conditions such as a preponderance of short haul business or a relatively large number of incoming calls compared with outgoing calls. For instance, it appears that at these exchanges a large proportion of the business is short haul and much of that business carries a ten-cent rate of which the toll line company under the present basis receives nothing for the line haul, while if the proposed basis were made effective the toll company would receive $1\frac{1}{2}$ cents for the line haul.

The protestants appear to base their opposition to the application solely upon an objection to any reduction in the compensation received. They do not propose any method for adoption that would protect their revenues and permit of the elimination of the higher costs or that would permit of the improved service that it is claimed will result if the applicants' proposal is authorized.

Upon the entire record, we are of the opinion and find that the establishment of a method under which operating conditions may be improved and the cost thereof reduced and a more equitable basis of compensation established than results from the application of the maximum statutory rate covering the compensation to be paid for originating and terminating toll messages will be in the public interest and that the establishment of the proposed schedule of compensation will tend to that result. We, therefore, conclude that an order should be entered requiring the discontinuance of the practice of charging for incoming and outgoing toll messages, uniform terminal fees with a maximum of 5 cents for each message and that there be substituted therefor the basis of compensation as applied for herein, said basis to become effective on and after January 1, 1928, and to remain in effect until changed or modified by order of the Board.

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VERMONT PUBLIC SERVICE COMMISSION.

RE F. A. AND EDGAR A. JEWETT.

[No. 1120-G.]

RE VERGENNES POWER COMPANY.

[No. 1269.]

Service — Discontinuance — Admission of inadequate street car service — Bus application.

1. By filing an opposing application for a certificate to operate motor busses over substantially the same territory served by its street cars an interurban railway company was held to admit the force of the position taken by another applicant for the same certificate that the street railway service was inadequate, p. 226.

Certificates of convenience and necessity — Preference between applicants — Motor utility.

2. The application of a motor utility operator already successful in other territory to substitute his service for that of an interurban railway company, proven to be inadequate, was preferred to the application of the railway company itself to substitute busses over its own lines, p. 226.

Monopoly and competition — Inadequate service as reason for permitting — Street railways.

3. Service to the public is of first importance and considerations looking towards the protection of a transportation monopoly which has not rendered adequate service should not be accorded any great weight on an application by another carrier for authority to serve, p. 227.

Crossings — Protection of street railway and bus intersections — Abandoned service.

4. A rule of the Commission, governing the operation of motor busses and prohibiting the stopping of a bus for the exchange of passengers near any designated stopping place of an electric railroad, was not applied to the licensed operations of a motor utility between cities or wherever they intersected the tracks of an interurban railway whose service had been proven inadequate, the regulation of such matters being left to city authorities, p. 228.

[October 27, 1927.]

APPLICATION of a motor utility for a certificate of public good; approved.

Appearances: W. N. Theriault and S. Hollister Jackson, for F. A. Jewett & Son; E. M. Harvey, for Vergennes Power Company; H. C. Shurtleff, for Montpelier & Wells River Railroad; Mr. Frank L. Small, Mayor, for the city of Barre.

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By the **Commission**: October 16, 1925, when it was generally understood that the electric railroad between Barre and Montpelier was about to discontinue operation, petitioners Jewett filed their application for a public good certificate to operate motor busses between these cities, a distance of about six miles.

Later in the fall of 1925, the Vergennes Power Company, a Vermont corporation, purchased the trolley line and equipment and has operated the same to date under new franchises.

April 29, 1926 petitioners Jewett filed an amended petition to operate busses on the following streets in the city of Barre: Washington, Nelson, Tremont, Elm, Summer, Maple avenue, Seminary, and North Main street to the city limits and on the following streets in the city of Montpelier: river to Pioneer, Berlin, East State, College, Emmons, Main, Spring, Elm, and State streets.

May 7, 1926 Vergennes Power Company filed its application for a public good certificate to operate busses in Barre and Montpelier over loop routes substantially similar to the routes indicated above in the amended petition of Jewett.

No motion was made by counsel for either petitioner to advance the cases to hearing until August 10, 1927.

[1, 2] On October 25, 1927, the second day of the hearing on these petitions, the Vergennes Power Company filed its amended petition for a public good certificate to operate motor busses between the cities of Barre and Montpelier and through the town of Berlin in addition to the loop routes in these cities covered in its original petition.

On all the evidence presented we find that the Vergennes Power Company has completely failed in furnishing to the public a proper and adequate transportation trolley service between the cities of Montpelier and Barre, that the track is out of repair to such an extent that its operations are unsafe, and that the cars do not run on schedule time. The testimony was all one way to the effect that the service of the trolley line was inadequate in meeting the reasonable demands of the traveling public, the Vergennes Power Company offering no evidence in explanation of this breakdown in service. By filing its application to run motor busses between these cities, the Vergennes Power P.U.R.1928B.

Company admits the force of the position taken by witnesses for the petitioners Jewett. The issue, therefore, resolves itself into the simple question: which petitioner is best qualified to render an adequate bus service? On the record we are compelled to hold in favor of the petitioners Jewett, who for the past seven years have been operating busses successfully between Barre and Burlington, and against the Vergennes Power Company, which has only recently become a reluctant convert to the bus idea.

Since the enactment of No. 74 of the Acts of 1925 conferring upon this Commission broad powers of regulating motor busses, in an endeavor to protect this trolley road from bus competition, we prohibited the petitioners Jewett from competing with this railroad in carrying local passengers between Barre and Montpelier on the through bus operations between Barre Burlington. Notwithstanding this protection afforded the trolley line, its service has failed to improve.

[3] The decision of this Commission in Nos. 1234-A and 1246-A, petitions of William S. Appleyard and Burlington Traction Company (P.U.R.1927D, 692, 695) re motor bus operations on North avenue in Burlington, April 25, 1927, is pertinent to this case. In that case we said: "It is not to its credit as a public servant that this company (the Burlington Traction Company) needed the spur of the Appleyard hearing to make it give ear to the necessities for bus service on North avenue. In matters of this kind and on the record of this case and of this company, we are of the opinion that service is of first importance and that considerations looking towards the protection of a transportation monopoly which has refused to render adequate service should not be accorded any great weight." We are, therefore, of the opinion that the public good will be no longer promoted by a further prohibition on petitioners Jewett against transporting local passengers between Barre and Montpelier.

There is no question in our minds that the public good will be best promoted by allowing the petitioners Jewett to operate busses on the loops above described in the cities of Barre and P.U.R.1928B.

Montpelier in conjunction with the Jewett busses between these two cities.

The petitions of F. A. and Edgar A. Jewett are, therefore, allowed and the petitions of the Vergennes Power Company are denied.

[4] No. 8 of the Rules and Regulations governing the operation of motor busses prohibiting the stopping of a bus for the purpose of taking on or discharging passengers within 50 feet of a designated stopping place of an electric railroad shall not apply to Jewett's operations within and between the cities of Barre and Montpelier or wherever they cross the company's tracks. This is a matter for the city authorities to regulate.

WISCONSIN RAILROAD COMMISSION.

RE DULUTH STREET RAILWAY COMPANY.

[R-3439.]

Valuation — Construction cost as capital charge — Rate base — Materials and supplies.

1. A charge may properly be made to fixed capital accounts on account of the company's funds being tied up in construction materials, but it would be an improper duplication of charges to patrons to include materials and supplies, as such, in the rate base, p. 231.

Valuation — Charges to capital — Purchase of competitor's right as part of rate base.

2. A charge under the title "Purchase Brown Bus Line Rights" was not considered an item properly to be included in fixing of value as a rate base where little or no equipment was purchased in this transaction, which amounted practically to a consideration being paid for a promise to discontinue competitive operation, p. 231.

Valuation — Capital charge — Prospective viaduct construction.

3. A proposed capital investment made necessary by a former Commission order directing the construction of a viaduct over a crossing and apportioning part of the expense to a street railway, being a future matter concerning which there was considerable question as to the time when the construction would actually be made, was not considered a capital charge for the purposes of obtaining a rate base, p. 232.

Return — Operating expenses — Payment to affiliated bus line.

4. In determining normal operating expenses a further reduction was made to represent a year's deficit of a bus line which a street railway company had agreed to reimburse, p. 233.

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Depreciation — Retirement expense — Consumers' advances — Street railway.

5. A retirement expense of 2.5 per cent on the Commission's valuation was believed to be an adequate charge against operations to give due recognition to consumers' advances where the valuation represented an undepreciated value, and, therefore, included, to the extent of the retirement reserve, an investment made out of the advances by the consumers, p. 234.

Rates — Reasonableness — Factors to be considered — Traffic restriction.

6. Rates of fare should not be established to produce theoretical returns when their practical application is likely to restrict traffic so greatly as to defeat their own purpose, p. 235.

Street railways — Automobile competition — Street railway — Return.

Discussion of the precarious financial condition of street railways since the advent of the automobile, p. 235.

[December 3, 1927.]

APPLICATION of a street railway utility for increased fares; rates increased.

By the **Commission**: In its petition, filed July 11, 1927, the Duluth Street Railway Company represents that the petitioner is a corporation duly organized and existing under and by virtue of the laws of the state of Minnesota, and duly authorized and licensed to conduct a street railway business within the state of Wisconsin; that the petitioner now owns and operates an electric street railway in the city of Superior, under and by virtue of an indeterminate permit, under the provisions of § 193.35 of the Wisconsin Statutes.

It is further represented that on October 23, 1922, petitioner applied to the Railroad Commission of Wisconsin for a valuation of its property and upon such application and petition hearing was had and the Railroad Commission found and determined the value of the property of petitioner used and useful in street railway service in the city of Superior as of December 31, 1922, to be the sum of \$1,225,000.

It is further represented that the Railroad Commission of Wisconsin, by its order made September 15, 1923, fixed and established the following rates of fare effective in the city of Superior, to wit:

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A cash fare of 10 cents and a ticket rate of fare of five tickets for 30 cents, which ever since have been and are now the legal rates. Said rates of fare were fixed and authorized by the Railroad Commission of Wisconsin pursuant to an agreement between petitioner and the city of Superior and upon the understanding that petitioner would give the said rates a fair trial for a sufficient length of time to develop with certainty whether or not they would produce revenue sufficient to pay operating expenses, including taxes and a reasonable and proper provision for depreciation, and also to provide an adequate and reasonable return on the reasonable value of petitioner's street railway property.

Petitioner contends that such rates of fare have been in effect since October 1, 1923 and that the revenues obtained since that date have been wholly insufficient to give it an adequate return on the value of its property, and under normal operating conditions with the enforcement of every possible economy will continue to be insufficient to the extent of actual confiscation of petitioner's property.

Petitioner prays, therefore, that the Railroad Commission find and determine, and by appropriate order, put into effect in the city of Superior such increased rate of fare upon petitioner's street railway lines in said city as is found to be reasonable and as will be fair and adequate to the public and to petitioner.

Hearing was held September 26, 1927 at Superior. There appeared on behalf of the petitioner Mr. Fridley of the law firm of Grace, Fridley & Crawford. Mr. L. R. McPherson, city attorney of Superior, appeared on behalf of the city. During the hearing extensive and detailed data were presented as evidence by the company covering the company's operations in both Duluth and Superior for the more recent years.

In the Commission's order of May 28, 1923, P.U.R.1923D, 705, 736, fixing a rate base representing the fair value, cognizance was taken of all elements, which in its judgment must rightfully be considered in determining fair value. The following is a quotation from this order:

"After a careful consideration of all the evidence in this case, and having in mind the law regarding valuations, as we under-P.U.R.1928B.

stand it, and having in mind, further, that this property is a going concern, it is our conclusion that a fair amount to be used as a rate base is \$1,225,000 subject to adjustment for increases or decreases in the amount of property since December 31, 1922."

This value includes the following allowances:

Materials and supplies	\$30,330.00
Working capital	9,670.00

[1] In the presentation of its case the company has estimated the requirement for materials and supplies to be \$52,364.62. Reference to the various operating and maintenance accounts leads us to conclude that such amount exceeds the value of materials and supplies needed, except as considerable amounts might properly be carried for construction purposes. On construction work a charge may properly be made to fixed capital accounts on account of the company's funds having been tied up in construction materials and it would be an improper duplication of charges to patrons to include construction materials and supplies, as such, in the rate base. We conclude that allowances made for materials and supplies in our decision of May 28, 1923, *supra*, are sufficient at the present time.

[2] The net additions to property and plant from December 31, 1922 to December 31, 1926, according to the company's Exhibit No. 29 submitted at the hearing, amount to \$73,098.68. In view of the testimony taken at the hearing and tending to show that the company has in general followed fair and accepted accounting standards in keeping record of capital additions, the Commission is inclined to accept, for the most part, the company's statement of property and plant additions without audit. A question arises in connection with an item of \$7,026.29 appearing in the 1925 additions to capital under the account title "Purchase Brown Bus Line Rights." Testimony shows that little or no equipment was purchased in this transaction which practically amounted to a consideration being paid for a promise to discontinue operating in competition with the street railway.

We do not consider this an item to be included in the fixing of value as a rate base.

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[3] Petitioner claims that a further capital investment will be necessary as a result of the Railroad Commission's order of June 23, 1927 ordering the construction of a viaduct over the Twenty-first street crossing and imposing upon the street railway as its share of the cost of such construction, the sum of \$20,200. In view of the fact that this investment lies in the future, and there is considerable question as to the time when the construction will actually be made, the Commission believes that for the purpose of the present case, this proposed investment should not be considered.

After giving proper consideration to the valuation determined by the Commission as of December 31, 1922 and to net additions up to December 31, 1926 the Commission believes that for the purposes of this case a fair value of \$1,291,073 will properly reflect the value of the property of the street railway company used and useful in the operation of its business at the present time.

The following table shows the company's statement of income for the years 1925 to 1927 inclusive, as set forth in its exhibit No. 11 submitted at the hearing.

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The Duluth Street Railway Company, Superior Division.

Statement of Income Years 1925 to 1927, Inclusive.

Last 4 Months of 1927 Estimated.

Classification.		1925.	1926.	1927.
Passenger revenue — street cars	101	\$346,278.06	\$337,061.12	\$320,084.63
Passenger revenue — feeder busses				4,247.76
Chartered cars	103	101.25	51.25	76.75
Mail revenue	104	297.73	319.51	311.84
Miscellaneous transportation revenue	109	575.00	940.00	
Total revenue from transportation	I	\$347,252.04	\$338,371.88	\$324,720.98
Station and car privileges — street cars	110	\$2,409.74	\$2,472.08	\$2,263.94
Station and car privileges — feeder busses				76.00
Rent of equipment	116	7.30	48.00	67.20
Rent of buildings and other property	117	749.80	2,122.61	2,213.25
Power	118			
Miscellaneous	1119	83.47	4.35	43.16
Total revenue from other railway operations	II	\$3,250.31	\$4,647.04	\$4,662.55
Railway operating revenues..	201	\$350,502.35	\$343,018.92	\$329,383.53
Way and structures	I	\$47,588.80	\$50,183.22	\$40,991.29
Equipment	II	40,291.72	40,470.17	36,189.52
Power	III	34,266.23	34,066.06	33,858.69
Conducting transportation	IV	150,555.45	131,930.06	133,684.90
Traffic	V	545.20	329.16	345.19
General and miscellaneous	VI	50,145.56	52,376.98	67,217.98
Transportation for investment—Cr.	VII	*3,539.90	*359.30	*571.20
Railway operating expenses..	213	\$319,853.06	\$309,005.35	\$311,716.37
Net revenue—railway operation		\$30,649.29	\$34,013.57	\$17,667.16
Taxes assignable to railway operations	215	14,687.71	15,331.09	15,968.76
Operating income	I	\$15,961.58	\$18,682.48	\$1,698.40

(* red.)

Effective at the beginning of the year 1926 the method of apportionment between the Duluth and Superior divisions of the rates of car operators on the interstate lines of the company was changed.

[4] Prior to 1926 the wages of car men of the Superior division running on cars going into Duluth was charged to the ex-P.U.R.1928B.

pense of the Superior division and wages of car men of the Duluth division running on cars going into Superior was charged to the expense of the Duluth division. Beginning with the year 1926 the wages of all such men have been charged according to the hours actually employed in operation upon the respective divisions. The above table, according to testimony, contains an overstatement of operating expenses for the year 1925 amounting to \$9,457.67 as a result of the incorrect method of apportionment of car men's wages. In determining normal operating expenses a further reduction of the 1925 expenses should be made amounting to \$4,305.09 representing the deficit for the year of the Itasca Allouez bus line for which the street railway company had agreed to reimburse the bus company.

[5] Adjusted operating expenses before taxes but including depreciation would be \$306,090.30 for the year 1925. Operating expenses for 1926, amounting to \$309,005.35 do not require adjustment, according to testimony. The 1927 statement of operating expenses includes \$10,496.51 which represents expenses incurred in connection with the operation of "feeder bus" service. The Commission believes that for the purposes of this case, the statement of expenses during the year 1926 furnishes a fair basis for its computations. Retirement expense, amounting to \$38,759.92 has been included in the statement of operating expenses. After giving due consideration to the fact that the valuation determined in this case represents an undepreciated value and, therefore, includes, to the extent of the retirement reserve, an investment made out of advances by the consumers, it is believed that a retirement expense of $2\frac{1}{2}$ per cent on the Commission's valuation will be an adequate charge against operations and will give due recognition to consumers' advances.

A complete statement of the company's operating expenses briefly would show the following:

Operating expense (before depreciation and taxes)	\$270,245.43
Retirement expense ($2\frac{1}{2}$ % of Commission's valuation)	32,275.00
Taxes (1926 taxes)	15,331.09
Total operating expenses	\$317,851.52

In order to provide an 8 per cent return on the company's investment in property and plant as found by the Commission, P.U.R.1928B.

an additional revenue of \$78,113 would be required, making the total revenue requirements of the company about \$421,132. For a 6 per cent return the added revenue required would amount to about \$63,000 and the total required revenue to about \$396,000.

The company reports 5,355,282 revenue passengers during 1926 approximately 95 per cent of which were ticket fares and only 5 per cent cash fares.

The petitioner does not request the establishment of specific rates but requests the Commission to find and determine such increased rate of fare upon petitioner's street railway lines in the city of Superior as is found to be reasonable and as will be fair and adequate to the public and to petitioner. While the Commission in many cases has indicated that a return of 8 per cent on the fair value of utility properties was not under the circumstances in the cases decided an unreasonable return, these holdings are not to be taken as necessarily meaning that an earning of 8 per cent should be provided for by the Commission at all times under all conditions and for all utilities.

[6] It has been generally recognized that the increasing popularity of the automobile has furnished a very powerful competitor to the street railway company and has caused the latter much hardship and concern. Street railway companies do not enjoy the safety inherent in natural or guarded monopolies to the same extent that most types of public utilities experience this safeguard. Theoretically a rate of fare may be designed which, assuming certain conditions and ratios to remain constant, would meet all operating expenses and provide a definite and predetermined return on the company's investment. In actual practice, however, it has been quite definitely shown in numerous cases, that the assumptions that must necessarily be made in designing such a rate are not actually borne out. It would be comparatively simple for the Commission to determine with the aid of data submitted with this case a rate of fare that in theory would provide whatever revenue requirements might be considered adequate. The Commission questions very seriously, however, whether any schedule of fares would produce an 8 per cent return of the value of this property. No purpose will be served

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by establishing rates of fare to produce theoretical returns when their practical application is likely to so greatly restrict traffic as to defeat their own purpose.

At the hearing the city attorney protested against the establishment of any schedule higher than that in effect in Duluth. The record is silent regarding the company's attitude toward the Duluth fares. The applicant does not suggest any definite schedule of rates and it is the opinion of the Commission that the Duluth fares should be made effective in Superior.

The establishment of the Duluth fares results in a decrease in the cash fare from 10 cents to 8 cents and an increase in token fare from 6 cents to 7 cents. In providing this schedule the Commission feels that the reduced margin between cash and token fares will tend to increase the ratio of cash fares to token fares. Should this ratio be increased from the present 5 per cent cash fares to the Duluth ratio of 15 per cent cash fares the average fare will amount to 7.15 cents. Under a 10 cent cash fare and 7-cent token fare, assuming the present ratio of cash to token fares to continue, the average fare would also amount to 7.15 cents. Assuming that the Duluth fares will bring about a change in the ratio of cash to token fares in Superior corresponding to the present ratio in Duluth, the reduction in the cash fare will not reduce the company's revenue.

The increase token fare should very materially increase the company's revenue. While it cannot be shown that these rates will yield a full return on the company's property under the present conditions, in all probability, they will more nearly approximate the required revenue than higher rates that might unduly restrict traffic.

After giving careful consideration to all the circumstances in this case it is the opinion of the Commission that a cash fare of 8 cents and a ticket fare of 5 tokens for 35 cents will provide a reasonable schedule of fare for street railway service in the city of Superior.

Therefore it is *ordered* that the applicant, the Duluth Street Railway Company, be and the same hereby is authorized to discontinue its existing schedule of rates for street railway service in Superior, in so far as they are affected by this order and to

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place in effect a cash fare of 8 cents and a ticket fare of 5 tickets for 35 cents. Rates as provided herein shall be placed in effect for all service rendered on and after the first day of the month following the date of this order.

ARKANSAS SUPREME COURT.

ARKANSAS RAILROAD COMMISSION

v.

HARRY E. BOVAY et al.

[No. 213.]

(— Ark. —, 298 S. W. 331.)

Rates — Jurisdiction of the Commission — Limited by statutory grant — Toll bridges.

The Railroad Commission has no jurisdiction to entertain a petition for the regulation of rates over a toll bridge which is not proven to have been taken over as a part of the state highway system where the law (Acts 1919, p. 411, amended by Acts 1921, p. 177) conferring jurisdiction on the Commission makes no mention of such situation.

[October 10, 1927.]

Suit by operators of toll bridge for injunction restraining the Railroad Commission from hearing a petition filed by county judge asking for regulation of toll bridge rates; injunction issued and affirmed on appeal.

Appearances: H. W. Applegate, Attorney General, and John L. Carter, Assistant Attorney General, for appellant; George M. Gibson, of Walnut Ridge, and Charles B. Thweatt, of Little Rock, for appellees.

Smith, J.: This case originated in the Pulaski chancery court on a bill for an injunction against the Arkansas Railroad Commission to restrain that body from hearing a certain petition filed before it by J. C. Childers, county judge of Lawrence county, and other persons, asking the Commission to regulate and fix the tolls to be charged on a certain toll bridge spanning Black river on state highways Nos. 63, 67, and 25, at Powhatan, Lawrence county, Arkansas, on the grounds that the sched-P.C.R.1928B.

ule of rates fixed in the franchise under which the bridge was constructed is excessive and discriminatory, and that the county court of Lawrence county had no jurisdiction to fix the schedule of rates at the time it attempted to do so, as the Railroad Commission had sole jurisdiction of the subject-matter, and still has, under Act No. 571 of the Acts of 1919 (General Acts 1919, p. 411), and Act No. 124 of the Acts of 1921 (Acts 1921, p. 177), respectively.

Attached to the complaint as an exhibit thereto was the order of the county court granting the franchise to erect the bridge and to collect tolls thereon, the various items of which were specified. There was a provision in the franchise whereby the named tolls might be increased, if they were unremunerative, or, on the other hand, might be reduced if they were excessive.

Notice was given by the Railroad Commission that a hearing would be had on the petition addressed to it asking a reduction of the tolls, and the holders of the franchise appeared before the Commission and made objection to the hearing on the ground that the Commission was without jurisdiction, which motion was overruled, whereupon this suit was begun to enjoin the Commission from proceeding.

A demurrer to the complaint was filed, which was overruled, and, the Commission refusing to plead further and electing to stand on the demurrer, the court entered an order restraining and prohibiting the Railroad Commission from hearing the petition for a reduction of tolls and from assuming any jurisdiction over or making any order regulating tolls on said bridge.

The Railroad Commission excepted to this order and was granted an appeal to this court. The matter is now before us on a writ of certiorari which issued out of this court.

The pleadings in the case raise the question of the jurisdiction of the Railroad Commission to regulate the tolls upon the bridge in controversy.

It is the contention of the Commission that it has this jurisdiction under the acts of the General Assembly above referred to, and that the recent opinion of this court in the case of *Fulton Ferry & Bridge Co. v. Blackwood*, — Ark. —, 293 S. W. 2, is a recognition of this jurisdiction.

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The Act of 1919 was amended by Act No. 124 of the Acts of 1921, entitled:

"An act to amend Act No. 571 of the General Acts of the General Assembly of the state of Arkansas, for the year 1919, entitled: 'An act to create the Arkansas Corporation Commission and to define its powers and duties,' approved April 1, 1919, and to regulate utilities and public service corporations and for other purposes."

The Commission asserts its jurisdiction to act under subsection (A) of § 5 of the Act of 1921, which provides that:

"The jurisdiction of the Commission shall extend to and include all matters pertaining to the regulation and operation of (A) . . . toll bridges, ferries. . . ."

This identical section of the act in question was construed by this court in the case of *Gray v. Duffy*, 152 Ark. 291, 238 S. W. 60. The county court of Independence county entered an order fixing the rates of the tolls for the ferries in that county, and attempted to enforce these orders, whereupon certain citizens of that county brought an action in the chancery court to restrain the county judge from attempting to enforce the orders. A demurrer to this complaint was overruled, and the court made perpetual a temporary restraining order issued at the commencement of the action.

In the opinion on the appeal it was said that:

"The main question in the case is whether or not the power to fix ferry tolls is vested in the county court by the Constitution, or in the Railroad Commission by the recent statute creating that Commission. Act No. 124, Acts of 1921, p. 177." (*Supra*, at p. 293 of 152 Ark.).

It was there contended that article 7, § 28, of the Constitution of 1874, which provides, "County courts shall have exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, ferries, paupers, bastardy, vagrants," etc., related only to jurisdiction to establish ferries and left the legislature free to provide any agency it saw fit to regulate rates, but in answering this contention it was said:

"We do not agree to this interpretation of the constitutional provision, which in plain terms confers jurisdiction on the P.U.R.1928B.

county court 'in all matters relating to county taxes, roads, bridges, ferries,' etc. This undoubtedly includes the regulation of ferry rates, because it is a part of the control of ferries. It was the plain purpose of the framers of the Constitution to place within the jurisdiction of the county court all control and regulation of ferries. The jurisdiction was exercised by the county court, without objection, in the case of Covington v. St. Francis County, 77 Ark. 258 [91 S. W. 186]." (*Supra*, at p. 294.)

The decree of the chancery court was reversed and the cause remanded, with directions to sustain the demurrer to the complaint.

That case is exactly in point here, as the word "bridges" immediately precedes the word "ferries" in the section of the Constitution quoted.

The doctrine of that case was expressly reaffirmed in the case of White River Bridge Co. v. Hurd, 159 Ark. 652, 252 S. W. 917, which case involved the tolls to be charged on a bridge instead of a ferry, as in the present case, and it was there said:

"Under article 7, § 28, of the Constitution of 1874, the county courts of this state have exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, ferries, etc. Under this provision of the Constitution the county courts have exclusive jurisdiction of the matter of building bridges over water courses. The legislature might authorize county courts to build such bridges at the public expense or it might authorize them to grant the privilege to any person or corporation to build a toll bridge in the county over any navigable stream or other water course, where it might be deemed necessary for the public convenience, and too burdensome to be constructed by general taxation. Wright v. Morris, 43 Ark. 193, and Gray v. Duffy, 152 Ark. 291 [238 S. W. 60]."

Appellant insists that the recent case of Fulton Ferry & Bridge Co. v. Blackwood, *supra*, is a recognition of the authority of the legislature to create an agency which may regulate tolls on bridges which are a part of the highway system, P.C.R.1928B.

and that the Railroad Commission is such an agency and has had conferred upon it that jurisdiction.

The complaint here under review does allege that the bridge in question supplies a link in certain highways, which had been designated as state highways, but it does not allege that the bridge has ever been taken over as a part of the state highway system. The allegations are to the contrary, their purport being that certain persons are in charge of the bridge and are operating it as such under the franchise authorizing them so to do, and that petitioners before the Railroad Commission allege that these private persons are charging excessive tolls, which the petitioners seek to have reduced.

The Fulton Ferry & Bridge Company Case, *supra*, does hold that it is within the power of the legislature to grant to the State Highway Commission, or to any other state agency the right to enter upon, take over, construct, improve, and repair any existing public highway as a part of the state highway system, and to construct, maintain, and repair any bridges thereon, so long as it does not involve the levying of a tax on the general public for such purpose, and that a bridge may be taken over and incorporated into the state highway system, although it was erected under a franchise from the county court, upon making compensation for any property so taken.

We have here no such proceeding. There is no attempt to take over the bridge and incorporate it into the state highway system. On the contrary, the attempt is on the part of an agency of the state to exercise a jurisdiction vested in the county court, which cannot be done according to the decisions of this court in the case of Gray v. Duffy, and White River Bridge Co. v. Hurd, *supra*.

Appellee also insists that Act No. 135 of the Acts of 1927 (Acts 1927, p. 452) repeals by implication so much of the Act of 1921 as attempts to confer jurisdiction on the Railroad Commission to fix and regulate tolls on bridges, but as we have concluded that the power was never in fact conferred on the Railroad Commission it will not be necessary to consider any effect accomplished by the Act of 1927.

The decree of the court below is correct, and it is, therefore, affirmed.

NEW JERSEY SUPREME COURT.

PASSAIC CONSOLIDATED WATER COMPANY

v.

BOARD OF PUBLIC UTILITY COMMISSIONERS.

[No. 201.]

(— N. J. L. —, 139 Atl. 324.)

Commissions — Power to regulate managerial questions.

1. The right of utility regulation delegated to the Commission does not destroy the right of private ownership, and all the incidents there-to except in so far as may be necessary to curtail them to exercise properly the power of regulation, remain with the corporation, p. 245.

Accounting — Right to keep accounts — Incidents of private ownership.

2. One of the rights incident to private ownership is the keeping of accounts, not solely for the purpose of establishing a basis for fixing rates, but for such other matters as appertain to the ordinary business of a utility corporation, p. 245.

Commissions — Presumption as to the extent of powers.

3. The presumption is that the power given to bodies for the regulation of utility companies does not extend beyond the express terms of the statutory grant, p. 245.

Commissions — Jurisdiction and powers over the keeping of accounts — Independent account system.

4. The Board of Public Utilities under a law (§ 17, P. L. 1911, p. 378) providing that it shall have power to require every utility to keep intelligible accounts, has no authority to order the revision of the books of a company as to its capital account or to forbid it from setting up any other or different basis of fixed capital than that approved by the Board, p. 246.

[November 26, 1927.]

CERTIORARI by water utility to review order of Board of Public Utility Commissioners; order set aside.

Appearances: Lindabury, Depue & Faulks and Osborne, Cornish & Scheck, all of Newark, for prosecutor; John W. Queen, of Jersey City, and Thomas Brown, of Perth Amboy, for respondent.

Per Curiam: This case is before this court on a writ of certiorari. The writ brings up for review an order of the Board of Public Utility Commissioners dated January 7, 1926, affecting U.R. 1928B.

ing the accounts of the Passaic Consolidated Water Company, the prosecutor. The contents of the order will later be particularly mentioned. In order to understand the situation with reference to the making of the order, it is necessary to review briefly certain matters relating to the prosecutor which occurred prior to the making of the said order of January 7, 1926, P.U.R. 1926B, 193.

The Passaic Consolidated Water Company is a consolidation of five companies known as the Acquackanonk Water Company, East Jersey Water Company, Kearny Water Company, Montclair Water Company, and Passaic Water Company. The approval of this consolidation was made by the Board of Public Utility Commissioners on October 26, 1923. On March 7, 1923, the Board had filed a decision allowing an increase in rates to the five companies. In the consideration of the rate question, the Board had fixed the value of the used and useful property of said companies at \$11,500,000, of which \$11,200,000 was designated as fixed capital (that is, plant) and \$300,000 was working capital. The Board in its approval of the consolidation directed that the books of the prosecutor should be opened on the basis of consolidated book costs as shown in an exhibit referred to in said proceedings as Exhibit P-2. This exhibit fixed the valuations of plant and working capital at the figures hereinbefore mentioned.

The prosecutor opened its books on the basis of the consolidated book costs as of December 31, 1922, continued to the date of the merger, which was November 1, 1923. In the early part of the year 1924, the prosecutor rendered a report to the Board covering its operations from November 1, 1923, to December 31, 1923, on the basis indicated by the Board's decision. In its annual report for the year ending December 31, 1924, the prosecutor used a different set of figures. The amount of fixed capital as of December 31, 1923, was entered as \$23,170,398, and, after deducting depreciation reserve set up as a liability, it set up a net amount as fixed capital of \$20,209,714. The prosecutor explained in its report that this higher figure was the result of an appraisal made by Nicholas S. Hill, Jr., an expert in the valuation of public utilities.

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To these figures the Board objected. The result of its objections was embodied in the order dated January 7, 1926, *supra*, which required the prosecutor (1) to reform and rewrite its books of account to conform with the Board's decision of October 26, 1923, approving the consolidation; (2) to modify its charges made for depreciation; (3) to rewrite its books of account on said basis, and to submit to the Board for approval an amended annual report; (4) that, upon approval of such amended annual report being had, the prosecutor should set up no other or different basis of fixed capital than that so approved.

The writ of certiorari was allowed for the purpose of reviewing the validity of this order. The prosecutor contends that the issue is whether the Board can require a utility to enter on its records and accounts as the value of its fixed capital a sum arbitrarily determined by the Board without hearing or proofs and which sum is proven to be substantially less than the fair value of such assets. The Board contends that the issue is whether the Board can require a utility to keep its books, records, and accounts according to the uniform system adopted by the Board so as to afford an intelligent understanding of the conduct of the business of the utility.

The prosecutor alleges that it has in no way sought to use the higher valuation in connection with the rates charged or properly chargeable by it, or as the basis for the issuance of securities, or in any other matters over which the Board has jurisdiction or supervision; that it claims the right to enter its assets on its records at their fair value; and that it cannot be lawfully compelled to enter them at a substantially less value arbitrarily fixed by the Board.

The Board contends that under the provisions of the Utility Act it has the power to make the order referred to, and that said order is lawfully within the powers of the Board to enact.

The question presented seems to us to be somewhat academic. It nowhere appears in the record that the valuation placed upon its books by the prosecutor is sought to be used for any improper purpose. The Board defends its order, not because the valuation which it has fixed for rate-making purposes is likely to be lost either in its records or the records of the prosecutor, but

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because it feels, as evidenced by the argument of its counsel, that the prosecutor seeks to condemn its power and authority.

[1, 2] In disposing of this question, we will start out with the premise that the power of the Board is that of regulation and not of asphyxiation. The right to regulate a utility does not destroy the right of private ownership. All the incidents of ownership, except in so far as it may be necessary to curtail them to properly exercise the power of regulation, remain with the corporation. If the order of the Board is arbitrary and unreasonable and beyond the powers given to it by the statute, it is void. It seems to us that one of the rights of private ownership is the keeping of accounts, not solely for the purpose of establishing a basis for fixing rates, but for such other matters as appertain to the ordinary business of a utility corporation. It owes to its stockholders certain rights that may require an entry upon its books of what it determines to be the fair value of its property. It must be recognized that when a Board is fixing a basis for rates it may perchance mistakenly undervalue the property of the utility or eliminate from the valuation elements which in the past have required the expenditure of considerable funds.

In ascertaining the income and excess profits upon which taxes have to be paid to the Federal government, for example, it is fair that the full value of the property should be used. To use it requires that such a valuation shall be entered on the books of account. In the event of the sale of any of the company's property for which it has no longer use, there should be a record of the true value of such property. These illustrations might be multiplied. They are only used for the purpose of showing that in the conduct of the affairs of a corporation questions regarding its property will arise which require that there be entered upon its books other entries than that of the valuation fixed by the utility board for rate-making purposes.

[3] It is well settled that, when bodies are created for the regulation of utility companies, the presumption is that the power of regulation conferred does not extend beyond the express terms of the grant. *State ex rel. Major v. Patterson*, 229 Mo. 373, 129 S. W. 888, 892. In *Hackensack Water Co. v. P.U.R.* 1928B.

Public Utility Comrs. 96 N. J. L. 184, P.U.R.1922C, 60, 65, 115 Atl. 528, the court of errors and appeals said:

"It was the intent of the legislature that the exercise of the powers should be controlled, not only by the statute itself, but by the settled rules and principles of the common law."

[4] The power which the statute gives to the Board and upon which the Board relies to sustain its order in the present case is found in § 17 of P. L. 1911, p. 378. It is in these words:

"The Board shall have power, after hearing, upon notice . . . to require every public utility as herein defined:

"(d) To keep its books, records and accounts so as to afford an intelligent understanding of the conduct of its business and to that end to require every such public utility of the same class to adopt a uniform system of accounting. Such system shall conform, in so far as in the judgment of the Board is practicable, to any system adopted or approved by the Interstate Commerce Commission of the United States of America.

"(e) To furnish annually a detailed report of the finances and operations, in such form and containing such matters as the Board may from time to time by order prescribe."

"(f) To carry, whenever in the judgment of the Board it may reasonably be required, for the protection of stockholders, bondholders or creditors, a proper and adequate depreciation account in accordance with such rules, regulations and forms of account as the Board may prescribe."

We are of the opinion that the power given to the Board under these provisions of the statute is not sufficient to justify the order of January 7, 1926, P.U.R.1926B, 193. While there is ample authority to justify the provision that the prosecutor should adopt the uniform system of accounts prescribed by the Board, yet we are of the opinion that such a provision does not justify the provision of the order requiring the rewriting of the books of the company as to its capital account, or that portion of the order which declares that no other or different basis of fixed capital shall be set up than that approved by the Board. It may well be that a Board could require an entry upon the books of a utility to the effect that on such and such a date the P.U.R.1928B.

valuation for rate-making purposes was found by the Board to be a specific amount, but the order in the present case goes beyond that and is a prohibition that there shall not be set up on the books of the company for any purpose whatsoever any different basis of fixed capital than that which has been approved by the Board for rate-making purposes. This, we feel, transcends the power of the Board.

The order is, therefore, set aside, with costs.

NEW YORK COURT OF APPEALS.

HARRY H. EVENS et al.

v.

PUBLIC SERVICE COMMISSION, SECOND DISTRICT
et al.

(246 N. Y. 224, 158 N. E. 310.)

Rates — Power of legislature to control — Franchises — Street railway.

1. Street railway franchises, whether granted by municipal option prior to the enactment of Article 3, § 18 of the State Constitution, or directly by legislative action, are subject to legislative regulation as to rates, p. 249.

Commissions — Jurisdiction to relieve of franchise obligations — Electrification of street railway system.

2. A street railway system composed of eight consolidated companies, seven of which had been granted franchises directly from the legislature prior to the enactment of the constitutional provision (Article 3, § 18) regarding the control of fares and the eighth of which had been restricted to a 5-cent fare in an original charter to operate horse and mule cars, was held, as a unit, to be subject to the control of the Public Service Commission as to the regulation of fares on the theory that the electrification of the line and the magnitude of expense and innovation incident thereto was in effect a consent by all parties to a new contract in which a 5-cent fare restriction was not incorporated, p. 249.

Rates — Power of Commission to control — Waiver of franchise by municipality.

3. A consent by a city to the extension of lines by its traction system management pursuant to certain laws (Chap. 565, Laws 1890, amending Laws 1892, Chap. 676) specifically reserving to the legislature the right to regulate the fares of any railroad constructed and P.U.R.1928B.

operated under its provision is a waiver by the city of any right which it may have had to fare restriction prior to that time in original charters of the railway company, p. 253.

(POUND, J., dissents and CARDOZO, C. J., dissents in part.)

[October 4, 1927.]

APPLICATION of the comptroller of the city of Binghamton and others in their individual and official capacity for a writ of prohibition against the Public Service Commission. Upon issuance of the writ in a lower court, the receiver of the Binghamton Railway Company impleaded on appeal; order thereupon reversed and motion for rehearing denied, and city comptroller and others appeal to higher court; affirmed. For lower court decision see 214 App. Div. 122, 211 N. Y. Supp. 650.

Appearances: John J. Irving, Corporation Counsel, of Binghamton (Herbert H. Ray, of Binghamton, of counsel), for appellants; Thomas J. Keenan, of Binghamton, for respondent.

Crane, J.: On December 6, 1901, the Binghamton Railway Company, of which the defendant (respondent) William G. Phelps is receiver, was created by the consolidation of the Binghamton Railroad Company and the Binghamton, Lestershire & Union Railroad Company. On March 31, 1894, the Court Street & East End Railroad Company and the West Side Street Railway Company were merged into and became owned by the Binghamton Railroad Company. On August 22, 1892, the Binghamton Railroad Company was created by the consolidation of the Binghamton & Port Dickinson Railroad Company and the Binghamton Street Railroad Company. The Binghamton Street Railroad Company was created on May 24, 1890, by the consolidation of the Washington Street & State Asylum Railroad Company, Park Avenue Railroad Company, the City Railway Company, and the Binghamton Central Railroad Company.

The Binghamton Railroad Company, therefore, on and after 1894, had gathered to itself and consisted of seven railroad companies. By taking in the Binghamton, Lestershire & Union Railroad Company, the Binghamton Railway Company was the consolidation of eight railroad lines operating within and about the city of Binghamton. In this opinion I shall speak of the Binghamton Railway Company as the Binghamton Railway Company. P.U.R.1928B.

hamton Railroad Company as the Binghamton, Lestershire & Union Railroad Company, operated outside the city, and its franchise is in no way involved in this proceeding.

The receiver, above named, has applied to the Public Service Commission for permission to increase the rate of fare on the consolidated railroad. The special term granted a writ of prohibition, holding that the Public Service Commission had no power to regulate fares on the railroads in the city of Binghamton. The appellate division has reversed the special term and denied the application for prohibition. The powers of the Public Service Commission in this matter depend upon the nature of the franchises granted to these seven railroad companies and the subsequent action of the city authorities in modifying or abrogating their conditions. We will take them up one by one.

[1, 2] The Park Avenue Railroad Company apparently has no franchise from the city, as it was built on a private right of way.

The Binghamton & Port Dickinson Railroad Company received its franchise by a special act of the Legislature (Chap. 501 of the Laws of 1868) and the amount of fare may, therefore, be regulated by the legislature, or the Public Service Commission.

The franchise granted to the West Side Street Railway Company of the city of Binghamton, dated September 24, 1889, contained no condition or limitation as to fare. It contained the following provision:

"Fifth. Such consent is given upon the express condition that the provision of the act of the legislature of the state of New York entitled 'An act to provide for the construction, extension, maintenance, and operation of street surface railroads and branches thereof, in cities, towns, and villages,' passed May 6, 1884, and the amendments thereto which may be pertinent hereto shall in good faith be complied with; also, the reasonable ordinances and requirements of the city of Binghamton."

Chapter 252, § 13 of the Laws of 1884, being the act referred to in this franchise, fixed the rate of fare at 5 cents for one continuous ride. As to the franchise for this railroad, the rate of fare, being fixed by an act of the legislature, could be there-
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after regulated by the legislature or the Public Service Commission.

The Court Street & East End Railroad Company resolutions or franchises, dated April 1, 1887, and May 10, 1887, granted consent to the construction and maintenance of the road "upon the express condition that the provisions of law under which the company is incorporated which are pertinent to said consent shall be complied with." No other reference is made to the rate of fare. The company was incorporated under Chap. 252 of the Laws of 1884, above referred to, and as the rate of fare was limited by § 13 of that chapter, the legislature thereafter had the power of regulation; so, likewise, the Public Service Commission.

The Washington Street & State Asylum Railroad Company.—The franchise was by ordinance passed January 2, 1872, containing in § 5 thereof these words:

"The company may charge and collect from any person on entering their cars or carriages, for riding any distance upon said road on the same continuous route, within the corporation limits, a sum not exceeding 5 cents."

Section 23 of the ordinance has this:

"The restrictions, requirements, and regulations herein imposed upon said railroad company as the condition of this grant, shall be imposed, and required of all railroad companies using horse or mule power, which may hereafter build, establish, or maintain railroads in other of the streets in the said city, and for such purpose this resolution is declared to be 'an ordinance in relation to street railroads.'"

As this franchise was granted prior to January 1, 1875, when § 18 of article 3 of the state Constitution became effective, the regulation of fares upon the railroad was left subject to the police power of the legislature or the Public Service Commission.

City Railway Company.—The resolution adopted by the common council of the city of Binghamton, March 17, 1884, giving to this company power to construct its road, subjected it "to an ordinance in relation to street railroads passed January 2, 1872." This is the ordinance granting the franchise to the Washington Street & State Asylum Railroad, above referred to.

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In 1872 the legislature had the reserved power to regulate the fares of street surface railroads. This ordinance or franchise was to read as though that reserved power was a part of the franchise. When, therefore, this resolution relating to the City Railway Company made applicable to ordinance in relation to street railroads passed January 2, 1872, that ordinance must be taken with its limitations existing in 1872. At that time, the franchise fixing the fare at 5 cents was subject to modification by the legislature. Therefore the City Railway Company's franchise or rate of fare was subject to the power of the legislature or the Public Service Commission.

In summarizing our previous decision, this court said in *People ex rel. Garrison v. Nixon*, 229 N. Y. 575, P.U.R.1921A, 27, 28, 128 N. E. 255:

"We think that the following classes of franchises fall outside the scope of our decisions in *Niagara Falls v. Public Service Commission* (229 N. Y. 333, P.U.R.1921A, 39, 128 N. E. 247); *Quinby v. Public Service Commission*, 223 N. Y. 244, P.U.R.1918D, 30, 119 N. E. 433, 3 A.L.R. 685.

"1. All franchises granted directly by the legislature.

"2. All franchises granted by municipal authorities prior to January 1, 1875. Such franchises are subject to proper legislative regulation."

Matter of International R. Co. v. Public Service Commission, 226 N. Y. 474, P.U.R.1919F, 355, 124 N. E. 123, is authority for our present holding regarding the West Side Street Railway Company and the Court Street & East End Railroad Company franchises. On the face of these franchises themselves, the rate of fare is subject to regulation by the Public Service Commission.

There is only one other franchise to consider, that of the Binghamton Central Railroad Company. Resolution of the common council was passed May 7, 1883, giving this company the right to construct and operate a horse or mule railroad through certain streets. Section 3 reads:

"Sec. 3. The cars to be used on said railroad shall be drawn by horses or mules, only at a speed not exceeding the rate of seven miles per hour, and the said company are hereby authorized. P.U.R.1928B.

ized and empowered to charge for and receive from each passenger carried in their cars for any distance within the city of Binghamton, a sum not exceeding 5 cents, and the company may run cars without any other conductor than the driver, but shall employ careful, sober, and prudent agents—conductors and drivers—who shall keep a vigilant watch and lookout to avoid danger and negligence, and shall stop their cars to allow passengers to enter or leave the same.”

The appellate division has considered the rate of fare by this section to be linked up to the horse or mule motive power. This may or may not be correct. Standing by itself, I would have doubts as to whether the mere change of motive power to electricity—that is, a mere consent to such a change—would modify the provision as to the fare. There are other reasons to sustain the conclusion of the appellate division, which I much prefer, and to me are unanswerable.

It would be strange indeed if, upon consolidation of all these various railroads into the Binghamton Railroad Company, a small portion only of the line—that of one of the roads—should be restricted to a 5-cent fare; that as to the territory served by all the other consolidated roads at the rate of fare was subject to the powers of the Public Service Commission. Whatever we may spell out piecemeal from these various franchises, the public saw and dealt with one continuous consolidated line, with its branch connections. The common council of the city, after consolidation, treated with one corporation, the Binghamton Railroad Company.

Electrification of the road, as we all know, was a radical and expensive change in motive power. It required change in equipment as well as in power; poles, wires, new rails, and roadbed had to be constructed. The consent of the city to the change was more than a mere consent; it was a contract entered into on April 26, 1892, between the Binghamton & Port Dickinson Railroad Company and the Binghamton Street Railroad Company (by consolidation, the Binghamton Railroad Company). After reciting the consent of property owners to the change, the consent of the city of Binghamton was recorded upon many conditions; the size and shape of the poles to be erected were speci-

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fied; the city was given the right to use the poles for the fire and police department wires and for its electric light plant. The contract also gave the right to the railroads to relay all their tracks and "to build, maintain, and operate a double track, . . . and to make all proper and necessary connections between its said tracks and the tracks of any other street railway in the city of Binghamton, . . . upon the express condition, however, that the said company shall replace all pavements on streets torn up by it," etc. This contract further provided how much the railroad companies should pay to keep the surface of the street within the rails and for one foot outside thereof in repair. The Binghamton Street Railroad Company was also given the right to lay additional tracks. This contract was executed by the presidents of the railroads and the mayor of the city.

In view of the consolidation and the anomalous situation arising from the mixture of franchises, it is quite evident that, on entering into this formal contract regarding the maintenance and construction of electric passenger railroads in the city, the parties considered that they were fixing all obligations one toward the other in reference to such operation. If it were intended that a 5-cent fare should be fixed or continued, it seems but natural that we would find some provision for it in this contract. The reason it is not there is because all the parties knew that there was no limitation for a 5-cent fare on any of the roads, except that which had been formerly owned by the Binghamton Central Railroad Company.

In this sense, therefore, and because of this formal contract, I think the consent to the change of motive power did modify the franchise of the Binghamton Central Railroad Company, which in 1890 became part of the Binghamton Street Railroad Company.

[3] But a better and further reason for the abrogation of this resolution of 1883, relating to the Binghamton Central Railroad Company, is to be found in the consents which were subsequently given by the city to the Binghamton Railroad Company for the extension of its various lines. In December, 1895 (Exhibits 15 and 17 of the case), franchises were given to the P.U.R.1928B.

Binghamton Railroad Company (which, as I have said, included the Binghamton Central Railroad Company) to extend, construct, operate, and maintain a single track railroad along numerous streets named in the resolution or franchise of the common council. These were granted upon express conditions, one of which reads as follows:

"Second. That the provisions of article 4 of an act of the legislature of the state of New York, passed June 7, 1890, known as the Railroad Law, as amended by an act of the said legislature passed April 15th 1892, pertinent thereto, shall be complied with."

Article 4, referred to (Laws 1890, chap. 565, amended Laws 1892, Chap. 676), includes § 101, fixing the rate of fare, which section ends with these words:

"The legislature expressly reserves the right to regulate and reduce the rate of fare on any railroad constructed and operated wholly or in part under such chapter or under the provisions of this article."

Can it be that the legislature has the reserved power to regulate the rate of fare for these extensions of the Binghamton Railroad Company, and has no power over other portions of the route? Is one line to be thus chopped up? Taking into consideration of all these franchises, the consolidation of the various companies, the actions of the common council of the city of Binghamton, the specific references to the provisions of the Railroad Law (Consol. Laws, ch. 49), the fact stands out unaffected by theory or argument that the city of Binghamton never considered until lately (1918) that the rate of fare on the Binghamton Railroad Company was limited by contract with the city to 5 cents, and was, therefore, beyond the power of regulation by the Public Service Commission.

That Commission has jurisdiction to determine how much the passengers shall pay to ride on the cars of the Binghamton Railway Company, and, while we disagree with the appellate division in its reasons, we do agree with its conclusion in denying a writ of prohibition.

The order should be affirmed, with costs.
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Andrews, Lehman, and O'Brien, JJ., concur.

Cardozo, C. J., dissents as to franchises of Washington Street & State Asylum Railroad Company and the franchises of the Binghamton Central Railroad Company and the City Railway Company as originally granted, and in other respects concurs.

Pound, J., dissents; Kellogg, J., not sitting.

Order affirmed, etc.

NEW YORK SUPREME COURT, SPECIAL TERM.

LONG ISLAND RAILROAD COMPANY

v.

GLEN COVE & NEW YORK COACH CORPORATION.

(130 Misc. 303, 223 N. Y. Supp. 398.)

Injunction — Grounds for refusing or granting — Unauthorized bus service.

1. Operation of a motor bus utility unauthorized by the Commission or any other governmental authority cannot be enjoined by a court in a suit for injunction filed by a competing railroad unless the latter can show some irreparable, impending loss if the former's activity be allowed to continue, p. 256.

Injunction — Grounds for refusing — Failure to show damage — Motor busses.

2. Injunction will not issue because of an alleged "irreparable loss" by a railroad as a result of the illegal operation of a motor bus carrier unless there is clear evidence of diminution in revenue of the latter as a direct result of the activity of the former, p. 257.

[June 14, 1927.]

Suit for injunction by railroad to restrain bus company from further operation; complaint dismissed.

Appearances: Joseph F. Keany, of New York city (Edward B. Newburn, of New York city, of counsel), for plaintiff; Celler & Kraushaar, of New York city (Emil Weitzner, of New York city, of counsel), for defendant.

Valente, J.: The plaintiff in this suit has already obtained a temporary injunction restraining the defendant from the operation. P.U.R. 1928B.

ation of a bus line between the city of Glen Cove, in Nassau county, and Forty-Fifth street and Broadway, borough of Manhattan, New York city, as its termini, and seeks to have the same in this suit made permanent. The plaintiff's railroad operates a branch between Glen Cove and the Pennsylvania station, at Thirty-Third street and Seventh avenue, in the borough of Manhattan, and has been chartered for a long period of years to operate the same, and it has an entrance into the borough of Manhattan by tunnel under the East river, obtained under the provisions of a trackage agreement between the Pennsylvania Tunnel & Terminal Railroad Company, the Pennsylvania Railroad Company, and it.

The plaintiff claims that, by reason of the failure of the defendant to procure the consent of the municipal authorities of New York city for the operation of the bus line, the absence of a certificate of convenience and necessity from the Public Service Commission of this state, or the consent of the Transit Commission, and the absence of any separate approval by resolution or contract on the part of the mayor of the city of New York for its operation, as provided in Chap. 466 of the Laws of 1901, the defendant's maintenance thereof is an illegal one, and subject to the restraint for these reasons by the court. It appears that the defendant's application to the Public Service Commission for a certificate of convenience and necessity was denied because of lack of jurisdiction, though it had obtained franchises from the proper local authorities for its operation in Nassau county, and that its application to the city of New York for a franchise was pending undetermined, for the reason that the policy of the board of estimate was to pass upon franchises for bus systems within the borders of the city before taking up those of suburban lines, and that the former determination had not yet been made, and the record plausibly discloses that its operation within the city is tolerated because of the great public necessity and emergency now existing.

[1] The mere fact that the defendant has technically violated certain provisions of law is not of itself a legitimate ground or basis for the awarding of injunctive relief in this case. It is not the violation of a statute, but some gross, unpreventable, and P.U.R.1928B.

irreparable injury which plaintiff suffers as the proximate result of defendant's act that gives it redress, if any. The plaintiff is not a proper party for the purpose of enforcing technical compliance with the law. Its right, if any, must rest upon the equitable ground of special injury to it. As the court of appeals said in *New York, Ontario & W. R. Co. v. Griffin*, 235 N. Y. 174, P.U.R.1923D, 739, 744, 139 N. E. 231:

"The basis of the injunction in this case, it must be remembered, is the irreparable loss to the plaintiff, and not merely the violation of some provision of law."

It is clear, therefore, that the case rests upon an entirely different ground than it would had the plaintiff been the city of New York or some agency of the state.

[2] The decisive question, therefore, in this case, is that of irreparable injury to the plaintiff, and the record in this case fails to show by a preponderance of the creditable evidence that the defendant's maintenance of this system of bus line works such result upon the plaintiff. There are a number of reasons why such is not the fact from the standpoint of the law, among them that the lines are not parallel; that, while starting at a common point, they diverge past through different sections and end at termini distant from each other in the congested heart of New York city. Nor is the evidence convincing that the diminution in revenue at two stations of the plaintiff in Glen Cove in the years 1925 and 1926, when compared, was due in any way to the defendant's business. It is significant that the plaintiff failed to produce any evidence respecting receipts at other stations in Nassau county. Even the plaintiff's witnesses stated that tickets from departing points in Nassau county were sold at the Pennsylvania station. The record fails to show what the amount of such sales were.

Moreover, the defendant's system was an express one, as contrasted with the plaintiff's, and many other surmises and conjectures might be made to explain the discrepancy on grounds other than contended for by plaintiff. My colleague who granted the temporary injunction had before him but affidavits which *prima facie* might support a finding of competition. The full proof, however, adduced upon the trial, has disposed of that in-
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ference in a different light, and I decide that the plaintiff has failed to prove sufficient grounds for an order of this court making permanent the temporary injunction heretofore issued.

My judgment is that the temporary injunction should be vacated and final judgment granted to the defendant dismissing the complaint, with costs. Settle findings and judgment on notice.

UNITED STATES SUPREME COURT.

STATE OF WASHINGTON EX REL. STIMSON LUMBER COMPANY

v.

E. V. KUYKENDALL et al.

[No. 66.]

(— U. S. —, 72 L. ed. —, 48 Sup. Ct. Rep. 41.)

Public utilities — Test of status — Common carrier.

1. One who undertakes for hire to transport from place to place the property of others who may choose to employ him is a common carrier within settled principles, p. 261.

Public utilities — What constitutes public service — Towboats.

2. A tariff filed by an association of fifty owners of towboats was held to show that they held themselves out as common carriers, including the towing of logs, and for that purpose had devoted their towboats to the use of the public, and that they were common carriers not because of legislative fiat, but by reason of the character of the business carried on, p. 261.

Public utilities — What constitutes a common carrier — Limitation on liability for towing service.

3. A common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he operates, and the limitations of liability peculiar to towboats not having exclusive control of their tows and notices that tows are at the owner's risk are immaterial, p. 261.

Constitutional law — Deprivation of property — Towboats.

4. The contention of a lumber operator whose logs had been transported by a public carrier for less than the authorized tariff, that the state rate regulation deprived it of its property rights in violation of the 14th Amendment of the Constitution, had no foundation where the charges in question were conceded not to be excessive, p. 261.

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Constitutional law — Due process — Status of common carrier — Legislative declaration.

Statement that a private carrier cannot be converted into a common carrier by mere legislative demand consistently with the due process clause of the 14th Amendment of the Federal Constitution p. 261.

[November 21, 1927.]

WRIT OF ERROR to the supreme court of the state of Washington to review a judgment affirming a judgment of a superior county court affirming an order of the Department of Public Works requiring a towboat utility to collect the full rate for towing logs of the lumber company in accordance with the filed schedule; affirmed. See same case below, 137 Wash. 602, P.U.R. 1926C, 585, 243 Pac. 834. See also opinion of Department of Public Works, P.U.R.1925B, 31.

Appearances: Mr. Charles A. Reynolds for plaintiff in error; Mr. H. C. Brodie, and Mr. John H. Dunbar, Attorney General of Washington, for defendants in error.

Mr. Justice **Butler** delivered the opinion of the court: October 17, 1924, P.U.R.1925B, 31, the Department of Public Works, after hearing upon a complaint of relator, made an order which declared that a specified tariff rate for towing logs from Clifton to Lake Union in Seattle was "just, fair, and no more than sufficient," and directed the Shively Towboat Company to collect from relator charges based on that rate for towing done between March 1 and May 1, 1924. The superior court affirmed the order. Relator appealed to the supreme court, and there challenged the validity of the order and statutory provisions under which it was made on the ground that they are repugnant to the due process clause of the 14th Amendment. The court held them valid and affirmed the judgment. 137 Wash. 602, P.U.R. 1926C, 585, 243 Pac. 834.

Relator got logs near Clifton and had a mill for the manufacture of lumber at Lake Union. The distance by water is about 100 miles. The Northwestern Towboat Owners Association, in accordance with an order of the Department, filed a tariff effective September 30, 1923. The tariff included maps showing Puget sound and adjacent waters divided into zones; it named rates for towing between all points thereon; it contained a list P.U.R.1928B.

of fifty operators, including the Shively Company, that concurred therein; it specified rates to be charged for towing ships, scows, and logs between zones, and rates for many other services to be rendered by tugs. The rate specified for towing logs from the zone including Clifton to that including Lake Union was 94 cents per thousand feet. A note declared "all tows at owner's risk," and stated that the tariff was intended to name rates for all services on Puget sound and adjacent waters. Commencing March 1, 1924, the Shively Company towed logs for relator from Clifton to Lake Union; and, in accordance with an agreement between them, charged \$16.50 per section. Either could terminate the arrangement at will. A supplement to the tariff, effective May 1, 1924, named \$25 per section as the rate from Clifton to Lake Union. That rate was the same or a little less than 94 cents per thousand. Relator's logs were towed by the section, and the last mentioned rate was put in so that it would not have to scale the logs in order to ascertain the charges. June 6, 1924, relator complained to the Department, asserting, among other things not here material, that the business of towing logs was not affected with a public interest or within the jurisdiction of the Department. Then followed the hearing, order, and judgments above referred to.

The statutes of Washington declare that towboats operated "for the public use in the conveyance of persons or property for hire over and upon the waters within this state" are common carriers. They require that charges made by common carriers "shall be just, fair, reasonable and sufficient;" that the carriers file with the Department of Public Works schedules showing the rates to be charged; that the names of carriers who are parties to joint tariffs shall be specified therein; and that each party other than the one filing the tariff, shall file such evidence of concurrence as may be required. And the statutes make it unlawful for any such carrier to collect different compensation than that provided for in the schedules, and prohibit it from charging any person a greater or less compensation than that collected from others for like contemporaneous service. Other provisions authorize the Department to prescribe and enforce the P.U.R.1928B.

rates to be charged by all common carriers including towboats. Rem. Comp. Stat. §§ 10,344 et seq.

Relator does not here contest the reasonableness of the rate; it does not question the power of the state or the authority of the Department to prescribe and enforce reasonable rates for transportation by common carriers on Puget sound and adjacent waters in Washington; it does not contend that, if the Shively Company was a common carrier of logs by towboat, the agreement for transportation of relator's logs for less than the tariff would be valid, or that the order complained of would not be valid. It is established that, consistently with the due process clause of the 14th Amendment, a private carrier cannot be converted into a common carrier by mere legislative command. *Frost & F. Trucking Co. v. Railroad Commission*, 271 U. S. 583, 592, 70 L. ed. 1101, 1104, P.U.R.1926D, 483, 46 Sup. Ct. Rep. 605, 47 A.L.R. 457; *Michigan Pub. Utilities Commission v. Duke*, 266 U. S. 570, 577, 69 L. ed. 445, 449, P.U.R.1925C, 231, 45 Sup. Ct. Rep. 191, 36 A.L.R. 1105.

[1-4] It cannot reasonably be said that operators of towboats may not become common carriers in the towing of logs in Puget sound and adjacent waters. The manufacture of lumber at mills located by these waters is one of the principal industries of the state. The forests are tributary to the sound and waters connecting with it. Large quantities of logs are floated from the forests to the mills. Towboats are commonly used for that purpose. In all essential particulars that service is like the carriage of freight in vessels. The reasons for rate regulation are the same in one case as in the other. Within settled principles, one who undertakes for hire to transport from place to place the property of others who may choose to employ him is a common carrier. *The Niagara v. Cordes*, 21 How. 7, 22, 16 L. ed. 41, 46. The tariff filed by the Northwestern Towboat Owners Association shows that fifty owners held themselves out as engaged in the business of common carriers, including the towing of logs; and, for that purpose, they devote their towboats to the use of the public. They are common carriers, not because of legislative fiat, but by reason of the character of the business they carry on. The statute does not attempt to make P.U.R.1928B.

all towboats common carriers. Its application is limited to those operated in the public use for hire. The rule that towboats not having exclusive control of vessels towed are not to be held to the strict liability of common carriers¹ does not affect the question under consideration. And the notice in the tariff that all tows are at owner's risk is immaterial. "A common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he rests." *Liverpool & G. W. Steam Co. v. Phenix Insurance Co.* 129 U. S. 397, 440, 32 L. ed. 788, 791, 9 Sup. Ct. Rep. 469. The Shively Company stands the same as the other parties to the tariff. It was engaged in the general towboat business; it towed logs for others as well as for relator; it held itself out as a common carrier in that line of business and by the tariff gave public notice to that effect. Its towboat was devoted to the public use, among other things, for the transportation of logs. By its own choice, it became a common carrier. *Terminal Taxicab Co. v. Kutz*, 241 U. S. 252, 60 L. ed. 984, P.U.R.1916D, 972, 36 Sup. Ct. Rep. 583, Ann. Cas. 1916D, 765. The state had power to regulate its charges. *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77. The purpose of the regulations complained of is to establish reasonable rates to be charged, and to prevent unjust discrimination, by public carriers. Such regulations would be of little value if the state law permitted the shippers by private contract with public carriers to obtain the towing of their logs for less than the prescribed rates. Relator was free to have its logs towed by a private carrier for such compensation as might be agreed and without regard to the rates established by the Department. The order was not aimed at any such transaction. It being conceded here that the charges in question are not excessive, the relator's contention that the state rate regulation deprives it of its property in violation of the 14th Amendment has no foundation.

Judgment affirmed.

¹ *The Webb* (*The William H. Webb v. Barling*) 14 Wall. 406, 414, 20 L. ed. 774, 775; *The Margaret*, 94 U. S. 494, 496, 24 L. ed. 146, 147; *Eastern Transp. Line v. Hope*, 95 U. S. 297, 300, 24 L. ed. 477, 478. P.U.R.1928B.

CONNECTICUT PUBLIC UTILITIES COMMISSION.

RE CONNECTICUT LIGHT & POWER COMPANY et al.

[Docket No. 4992.]

Consolidation, merger, and sale — Desirability of merging utilities — Factors.

1. The advantage or disadvantage to the patrons of a community served by any merging company should be considered where it is proposed to merge several utility companies into a single consolidation, p. 267.

Consolidation, merger, and sale — Desirability of merger — Electric corporations.

2. There should be economic advantages in a merger of electric companies, by the reduction of overhead and general operating expenses and the guarantee of uninterrupted and improved service by the interchange of current where the size of the corporate property and the industry merged is not such as to become unwieldy under unified management, or to lose a proper degree of contact with its patrons, p. 268.

Valuation — Ascertainment of value for purpose of merger — Gas and electric utilities — Security issues.

3. The value of public utility property to be merged was determined by computing a practical estimate of all of the property based upon figures and evidence presented at the hearing and upon the official records on file in the office of the Commission, such appraisals being brought up to date by applying to the appraisal and to the actual cost of additions to the physical property, factors to express the value of the property in the terms of current price levels for construction, labor, and material, adding thereto the actual capital expenditures during the current year but making no allowance for organization, going value, or other nonphysical items, p. 270.

Consolidation, merger, and sale — Desirability of merger of gas and electric companies.

Discussion of the advantages accruing from merger of gas and electric utilities because of their dependence upon mutual relationship, p. 268.

[November 28, 1927.]

PETITION of gas and electric utilities for permission to merge or consolidate; petition granted with certain modifications as to valuation.

By the **Commission**: [Petitions and preliminary statements omitted. The following agreement is set forth:]

1. That the Connecticut Light & Power Company in con-P.U.R.1928B.

sideration of the premises and of the terms and conditions herein set forth, and of other good and valuable considerations, mutually agreed upon, does hereby agree to, and with the Bristol & Plainville Electric Company and the Middletown Gas Light Company to merge into itself and consolidate with itself said corporations, and said the Bristol & Plainville Electric Company and the Middletown Gas Light Company, in consideration of the premises and of the terms and conditions herein set forth and of other good and valuable considerations, do hereby mutually agree to and with the Connecticut Light & Power Company to merge with and into said the Connecticut Light & Power Company their respective rights, powers, privileges, franchises, and property, real, personal or mixed, so that all of the rights, powers, privileges, franchises, and property, real, personal or mixed, vested in the said the Bristol & Plainville Electric Company and the Middletown Gas Light Company transferred, merged, and vested in the Connecticut Light & Power Company, subject, however, to the sale, transfer, and conveyance of the street railway franchises, easements, rights, and property of the Bristol & Plainville Electric Company, as hereinabove recited.

2. Said merger or consolidation shall be upon the following terms. Said the Connecticut Light & Power Company shall issue 42,560 shares of common stock (\$100 par value each) as follows:

(a) 34,930 shares amounting to \$3,493,000 aggregate par value to the stockholders of the Bristol & Plainville Electric Company, in lieu of its \$1,386,000 par value of outstanding capital stock.

(b) 7,630 shares amounting to \$763,000 aggregate par value to the stockholders of the Middletown Gas Light Company, in lieu of its \$213,000 par value of outstanding capital stock.

3. Upon the issue and delivery by said the Connecticut Light & Power Company of said shares of stock hereinbefore referred to as the stockholders of the Bristol & Plainville Electric Company and the Middletown Gas Light Company, said stockholders shall surrender their certificate for shares of the capital stock of each of the said companies and the same shall be cancelled.

4. The Connecticut Light & Power Company hereby further

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agrees to pay all debts and liabilities of each of said the Bristol & Plainville Electric Company and the Middletown Gas Light Company, and all debts, liabilities, or duties of each of said corporations shall attach to the Connecticut Light & Power Company and may be enforced against it to the same extent as if they had been incurred or contracted by it, excepting with reference to street railway franchises, easements, rights, and property agreed to be sold, as hereinabove provided; and all liens upon the property of any of said corporations shall be preserved unimpaired.

5. This agreement is made subject to the approval of the Public Utilities Commission of the state of Connecticut in accordance with the provisions of the General Statutes of the state of Connecticut, and if approved by said Public Utilities Commission it shall be submitted to the stockholders of each of the parties hereto, and shall take effect and be deemed and taken to be the agreement and act of merger and consolidation of said corporations upon the approval thereof by the stockholders of each of said corporations, parties hereto, and upon the filing with the secretary of the state of Connecticut of a certificate subscribed and sworn to by the president or a vice-president and the secretary or an assistant secretary of the Connecticut Light & Power Company, setting out the terms of this agreement in full.

6. Upon the consummation of this merger and consolidation, as hereinbefore provided, the Connecticut Light & Power Company shall have and possess all the rights, powers, privileges, franchises, and property, real, personal or mixed, of the Bristol & Plainville Electric Company and the Middletown Gas Light Company, so merged with and into the Connecticut Light & Power Company, subject, however, to any existing liens thereon, and the same shall thereafter be as effectually the property of said the Connecticut Light & Power Company as they were of the several respective merged corporations, subject, however, to the sale, transfer, and conveyance of the street railway franchises, easements, rights, and property of the Bristol & Plainville Electric Company, as hereinabove recited, and the title to any real estate, whether by deed or otherwise, vested in either of said merged

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corporations, shall not revert or the deed in any way be impaired by reason of said merger or consolidation. A certificate shall be filed with the town clerk of each town where the property of any of the companies so being merged is located, setting forth the name of the company into which said companies owning said property shall become merged, the names of said companies, the date of the agreement, and the fact that the same has been filed and recorded in the office of the secretary of the state of Connecticut, in accordance with the provisions of Chap. 166 of the Public Acts of 1927.

7. The Connecticut Light & Power Company shall pay all of the expenses in any way connected with the merger and consolidation hereinbefore provided for.

8. This agreement shall be executed on the part of the Connecticut Light & Power Company, the Bristol and Plainville Electric Company and the Middletown Gas Light Company by their proper officers and under their corporate seals in as many counterparts as such officers may determine and each such counterpart shall be held an original.

In witness whereof, the parties to this agreement, in pursuance to resolutions duly passed by their respective boards of directors at meetings at which a quorum was present, caused the respective corporate seals of said corporations to be hereunto affixed and these presents to be signed by their respective presidents or vice-presidents, attested by their respective secretaries or assistant secretaries the day and year first above written.

Said petition was duly assigned for a hearing to be held at the office of the Commission in Hartford, on Wednesday, November 2, 1927, at 11 o'clock in the forenoon. Notice of the pendency of petition and of the time and place of hearing same was given to the petitioners and to the communities in which they render their respective public service, as per order of notice and return thereon on file and record will fully appear. At said time and place the petitioners appeared by counsel and officers and were fully heard. There was no appearance in opposition to the granting of the petition.

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General Statement

This joint petition was brought pursuant to § 3651 of the General Statutes relating to the merger and consolidation of public service corporations and by virtue also of Special Acts of the General Assembly in 1927, one, approved May 6th authorizing the Middletown Gas Light Company to merge with any other gas or electric company in Connecticut, subject to the approval of the Public Utilities Commission, and the other approved May 23, 1927, authorizing the Connecticut Light & Power Company and the Bristol & Plainville Electric Company to merge subject to the approval of the Commission.

The terms and conditions of the merger for which approval is so sought are contained in the articles of agreement hereinbefore set forth.

All of the petitioners are corporations organized and existing under the laws of the state of Connecticut, and each has special utility franchises granted by the legislature of said state, and all of said companies are at present confined in their operations to intrastate business.

It appeared from the evidence submitted in this case that the Connecticut Electric Service Company, a holding company organized under the laws of Connecticut by virtue of a charter granted by the legislature in 1925, has acquired and now owns all of the common stock of the petitioning companies. It is now proposed by the terms of said agreement to merge and consolidate the petitioning companies into and under the name of the Connecticut Light & Power Company with unified management and control.

[1] "Where it is proposed to merge several utility companies into a single consolidated company, the advantage or disadvantage to the patrons of and community served by any one of the merging companies, should be taken into consideration, and if it is found that the merger will operate to the detriment of such service or increase the cost thereof, the merger should not be approved; while on the other hand, if found to result in economies and betterment of service in the several communities served, the proposed merger or consolidation should be approved." (Re P.U.R.1928B.

Northern Connecticut Power Co. Docket No. 4656, dated March 4, 1926.)

[2] As stated by the Commission in the matter of joint petition of the Connecticut Light & Power Company, the Meriden Gas Light Company, and other companies for approval of a merger with and into the Connecticut Light & Power Company (Docket 4670, dated March 5, 1926), "The rapidly increasing use of electricity for light, heat, and power purposes, and the rapid development of steam generating and hydroelectric plants, with their connecting transmission lines, making available at all times throughout the company's system the use of electricity generated at any of the plants, has created the natural economic tendency to consolidate or merge the different interconnected electric companies. This trend of consolidating electric utilities has been especially noticeable throughout the country during the past year, and, where the size of the corporate property and industry merged is not such as to become unwieldy under unified management, or lose a proper degree of contact with its patrons, there should be economic advantages in such a merger by the reduction of overhead and general operating expenses, and the guarantee of uninterrupted and improved service by the interchange of current."

Specific Finding

The determination of the ratio of exchange of stock of the Connecticut Light & Power Company (for brevity hereinafter called the Light & Power Company) for stock of the Bristol & Plainville Electric Company (for brevity hereinafter called the Bristol Company) and stock of the Middletown Gas Light Company (for brevity hereinafter called the Middletown Company), was based on an estimate appraisal of the present value of the property of the two last named companies. An appraisal of the Bristol Company made in 1916 by the Charles H. Tenney Company of Boston, was reviewed by engineers of the Light & Power Company in 1925, and expressed in 1925 price levels of construction, labor, and materials. That appraisal so reviewed amounted to \$4,000,000, and included a valuation of \$1,000,000 placed upon the street railway property of the Bristol Company.

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Inasmuch as the street railway properties were segregated into a separate corporation known as the Bristol Traction Company, by approval of the Commission in Docket No. 4975, dated October 3, 1927, referred to further below, \$1,000,000 was deducted, leaving a balance of \$3,000,000. To this balance was added the actual cost of additions to the physical property from September 30, 1925, the date of the appraisal, to September 30, 1927, amounting to about \$403,000, or a total of \$3,403,000. Miscellaneous assets as of September 30, 1927, in amount of \$1,003,000 were added, and from such total addition there was deducted liabilities assumed as of the same date amounting to \$925,700, leaving a claimed net worth at the present time for the Bristol Company of \$3,480,533. Miscellaneous assets included an investment of \$750,000 in the stock of the Bristol Traction Company capitalization of the former street railway properties of the Bristol Company, approved by the Commission in the aforesaid Docket No. 4975, said capitalization being \$250,000 less than the capitalization sought by the Bristol Company.

An estimate appraisal of the Middletown Company made by construction engineers of the petitioners as of April 1, 1927, without, however, a detailed inventory of the physical property, amounted to \$650,000, to which was added additions from April 1, 1927, to September 30, 1927, amounting to about \$9,800, and miscellaneous assets on said date of \$126,000 or a total of \$785,800, from which were deducted the liabilities assumed of about \$20,200 leaving a claimed net worth on September 30, 1927, of \$765,600.

A tabulation or basis of proposed capitalization for merger purposes, as submitted by the petitioners, is as follows:
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Bristol & Plainville Electric Company:	
Approximate appraised value L. B. M. October 1925	\$4,000,000.00
Less street railway	1,000,000.00
	<hr/>
	\$3,000,000.00
Additions and betterments Sept. 30, 1925 to Sept. 30, 1927 ...	403,205.00
	<hr/>
Total	\$3,403,205.00
Add—Miscellaneous Assets	
Investments in affiliated companies	\$750,000.00
Cash	29,358.00
Accounts receivable	124,350.00
Material and supplies	86,044.00
Prepaid accounts	13,284.00
	<hr/>
	1,003,036.00
	<hr/>
	\$4,406,241.00
Less—Liabilities Assumed	
Mortgage debt	\$540,000.00
Notes and accounts payable	324,469.00
Accrued liabilities	61,239.00
	<hr/>
	925,708.00
	<hr/>
	\$3,480,533.00
Middletown Gas Light Company:	
Approximate appraised value April 1, 1927	\$650,000.00
Additions April 1, 1927 to September 30, 1927	9,769.00
	<hr/>
Total	\$659,769.00
Add—Miscellaneous Assets	
Cash	\$88,776.00
Accounts receivable	18,151.00
Material and supplies	19,096.00
	<hr/>
	126,023.00
	<hr/>
	\$785,792.00
Less—Liabilities Assumed	
Accounts payable and miscellaneous liabilities ..	\$14,282.00
Accrued liabilities and unadjusted credits	5,899.00
	<hr/>
	20,181.00
	<hr/>
	\$765,611.00
Summary	
Bristol & Plainville Electric Company	\$3,480,533.00
Middletown Gas Light Company	765,611.00
	<hr/>
Total	\$4,246,144.00

October 29, 1927.

This tabulation is made as of September 30, 1927, a subsequent statement submitted bringing the figures down to October 31, 1927, and thereby including capital expenditures for October gives the total figures for the two companies \$4,265,949, instead of \$4,246,144, appearing in the summary of the foregoing tabulation.

[3] After analyzing the agreement and figures submitted, the Commission could not find justification for approval of the proposed merger as respecting the amount of payment or stock of P.U.R.1928B.

the Light & Power Company, to be issued to the present stockholders of the Bristol Company and the Middletown Company in exchange for the property and franchises thus proposed to be merged.

On account of the present common ownership of stock, the geographical location of the Bristol & Middletown Company properties in connection with the existing properties of the Light & Power Company and the economic advantages of consolidated management, it appears to the Commission that a merger of the companies as petitioned for would be advantageous to the public interest, if the terms of such merger, as to financial consideration or capitalization could be modified in keeping with a lower or conservative valuation of the property and franchises.

The petitioning companies were subsequently called in for a conference on the question of capitalization or amount of stock to be issued by the Light and Power Company as a result of the proposed merger.

The petitioners, and particularly the Light & Power Company, claimed that the earnings, future prospects, and actual value of the property of the two companies to be merged with the purchasing company fully justified the figures set up in the agreement, but stated that if, in the opinion of the Commission the figures set up were too high, and not in every way satisfactory, they would gladly modify the terms of the agreement and accept any reasonable amount found by the Commission.

In the absence of any detailed inventory and appraisal of the physical properties on present prevailing price levels for labor and material, a practical estimate of value of all the properties of the two companies must be based upon the figures and evidence presented at the hearing, and upon the official records on file in the office of the Commission for each year since 1911.

The 1916 appraisal for the Bristol Company was brought down to date by the Commission's engineering staff by the process of applying to the appraisal and to the actual cost of additions to the physical property for the years 1917 to 1926, both inclusive, factors to express the value of the property in terms of 1927 price levels for construction, labor and material, and adding thereto the actual capital expenditures from January 1, 1927, to October P.U.R.1928B.

31, 1927, making a total of approximately \$3,132,000. This amount does not take into consideration organization and other nonphysical expenditures, proper items to be included in a valuation, nor does it include any amount for going value.

Adding miscellaneous assets of \$1,003,000 and deducting assumed liabilities of \$925,700 gives an appraisal of approximately \$3,210,000.

A percentage for nonphysical expenditures would materially increase this amount, and its exclusion should represent a conservative valuation.

The assets of the Middletown Company on September 30, 1927, were about \$456,500, made up of physical property at original cost of \$330,500 and miscellaneous assets of \$126,000. Applying factors to the company's physical property in place at the end of 1914, and to the additions to the property for the years 1915 to 1926, both inclusive, to express the value of the property in terms of 1927 price levels and adding at actual costs additions from January 1, 1927, to October 31, 1927, gives a total of approximately \$545,000. Deducting assumed liabilities of \$20,000 and adding miscellaneous assets of \$126,000, gives a present value of approximately \$651,000.

Although no allowance for organization and other nonphysical expenditures was made in arriving at this figure, the Commission believes the amount fairly represents the value of the property, today.

From the evidence relating to appraisals, historical cost, of physical property and the present assets of the Bristol Company and the Middletown Company; the Commission is of the opinion and finds that the proposed issuance by the Connecticut Light & Power Company of \$4,256,000 of its common capital stock in return for all outstanding common capital stock of the Bristol Company and the Middletown Company should be reduced to \$3,850,000, of which amount \$3,200,000 shall be issued for the stock of the Bristol Company and \$650,000 shall be issued for the stock of the Middletown Company. In setting up the consolidated balance sheet of the Light & Power Company after merger, the miscellaneous assets of the two companies so merged with it should be distributed to other than fixed capital account, P.U.R.1928B.

which account should include only the value of the physical property.

Based upon the evidence submitted, the modified capitalization set forth above, an existing unified ownership of the common stock of the several companies, and the reasonable expectation that the related industries can and will be operated more economically under consolidation, the Commission is of the opinion and finds that the petition should be approved and that the Connecticut Light & Power Company, the Bristol & Plainville Electric Company and the Middletown Gas Light Company should be authorized to merge upon the terms and conditions set forth in Exhibit A, excepting, however, that paragraph 2 of said agreement (Exhibit A) shall be modified with respect to capitalization and issuance of stock, in conformity with this finding and with the order hereinafter set forth. In the finding and order of approval in this case it is not intended to establish, and it should not be construed as establishing the fair value of the physical properties as a basis for rate-making purposes.

ORDER

Wherefore, it is hereby *ordered* and *decreed* that approval be and hereby is granted for the merger and or consolidation of the Connecticut Light & Power Company, the Bristol & Plainville Electric Company and the Middletown Gas Light Company under the name of the Connecticut Light & Power Company, upon the terms and conditions stated in the petition and said articles of agreement hereinbefore recited, except that the number of shares of stock of the Connecticut Light & Power Company to be issued for the stock of the Bristol & Plainville Electric Company shall be 32,000 shares with a total par value of \$3,200,000, instead of 34,930 shares with a total par value of \$3,493,000, as set up in paragraph 2 of said agreement; and except that the number of shares of stock of the Connecticut Light & Power Company to be issued for the stock of the Middletown Gas Light Company shall be 6500 shares with a total par value of \$650,000, instead of 7630 shares with a total par value of \$763,000, as stated in said paragraph 2 of said agreement; provided further however, and upon condition that such merger and or consolidation.

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tion on modified terms and conditions as herein stated and approved, shall be ratified by legal vote of the stockholders of each of the petitioning companies within sixty days from date hereof, and certified copies of such votes filed with the Commission.

We hereby determine and direct that notice of the foregoing finding and approval be given to petitioners and to the municipalities interested, by Henry F. Billings, secretary of the Commission, by forwarding by registered mail true and attested copies thereof, addressed one each to the Connecticut Light & Power Company, the Bristol & Plainville Electric Company, and the Middletown Gas Light Company, all at No. 36 Pearl Street, Hartford, Connecticut; one each to the mayors of the cities of Bristol and Middletown, at Bristol and Middletown, respectively, and to the boards of selectmen of the towns of Plainville, Plymouth, Burlington, Southington, and Middletown, at the respective towns, on or before the 30th day of November, 1927, and due return make hereon.

NEW YORK TRANSIT COMMISSION.

RE NEW YORK RAPID TRANSIT CORPORATION.

[Case No. 2857.]

Security issues — Sale of bonds at discount — Injury to city holdings — Traction.

1. A proposal of a traction utility to sell "sinking fund" bonds at a discount of 20 per cent under a contract to its parent company was held to be unjust and burdensome to the city which would lose a great amount under this arrangement in event of an exercise of its right to recapture the property in which it had an investment largely in excess of the utility, especially where it was possible to sell "first refunding" bonds to raise the amounts needed at a net return of from 95 to 97 per cent of par value, p. 280.

Security issues — Sale of bonds at excessive discount — Parent company — Prosperous subsidiary.

2. A sale of 5 per cent bonds by a traction company with net earnings above fixed charges of almost \$6,000,000 paying annual dividends of \$4,500,000 was believed to be possible at a much higher rate than 20 per cent discount, a figure at which the bonds were sought to be acquired by the parent company, p. 283.

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Security issues — Emergency bonds — Sale at excessive discount — Traction.

3. The sale of bonds alleged to have been authorized only for "emergencies" of a traction company at a small discount to realize sums needed for additional equipment instead of a proposed sale by contract of sinking-fund bonds of the same company to its parent concern at a 20 per cent discount was held not to be a breach of faith toward bondholders of the parent company purchasing with knowledge that the alleged "emergency" bonds were authorized as a part of a "plan for reorganization," especially where an amount in excess of \$33,000,000 of the total issue (\$50,000,000) would be left for "emergencies," p. 283.

Security issues — Jurisdiction of Commission to consider recapture provision of city traction contract.

4. It is neither proper nor necessary for the Transit Commission in passing upon a petition by a traction utility to sell certain bonds to raise funds for needed equipment to consider whether the right of recapture reserved to the city in the contract between these parties has or has not matured, it being sufficient for it to consider that in the event of such recapture, the proposed financing might involve the retirement of such bonds at a premium causing the payment of an amount in excess of the funds realized, p. 285.

Security issues — Power of Commission to examine bond sale between affiliated companies — Partnership for city in traction utility.

5. The Commission has the authority to examine the merits of a proposed sale of bonds at 80 per cent of par value by a traction utility to its parent company in view of the fact that there can be no bargain or negotiation between the two companies as to price, and that the parent company is both buyer and seller, fixing its own price and terms and admittedly making no effort to sell elsewhere or get a bid and that it may by corporate procedure turn such bonds into the sinking fund at 97 per cent as against the interest of the city who is a co-partner of the utility having an interest in the property many times greater than the latter and in many other ways vitally concerned by the proposed financing, p. 286.

Security issues — Commission power to require competitive bidding at sale of utility bonds.

6. The Commission has the right (Chap. V—Art. XXII—City Contract No. 4) to require that bonds sold by a traction utility to its parent company be disposed of by competitive bidding to protect the city against improvidence of corporate manipulation, p. 287.

[August 5, 1927.]

PETITION of rapid transit utility to consent to sale of certain bonds known as "refunding mortgage 5 per cent sinking fund gold bonds, series A" to parent company; petition denied.

Appearances: A. W. Williams, counsel for the petitioner;
P.U.R.1928B.

Joseph S. Devery and M. Maldwin Fertig, Counsel for the city of New York; Samuel Untermyer, special counsel, Clarence M. Lewis, Counsel for Transit Commission.

Lockwood, Commissioner: The petitioner applies for leave to issue \$20,000,000 par value of its 5 per cent refunding mortgage bonds, part of an authorized issue of \$350,000,000 of such bonds, of which \$93,508,500 par value were originally issued, of which \$91,164,500 were outstanding March 31, 1927, —\$307,000 being in the sinking fund and the balance \$90,857,500 being practically all in the hands of the Brooklyn-Manhattan Transit Corporation, of which the petitioner is a subsidiary, owned in its entirety by the Brooklyn-Manhattan Transit Corporation and its subsidiary, the Coney Island & Brooklyn Terminal Company, through stockholdings.

It is proposed to sell these bonds at a price of not less than 80 per cent of their par value and accrued interest, to yield to the petitioner \$16,000,000 to be applied approximately as follows:

Equipment of the railroad for initial operation	\$3,467,000
Additions or additional equipment for the railroad	11,033,000
Equipment for extension of railroad (Fort Hamilton)	118,000
Additions or additional equipment for the existing railroads ..	1,282,000
Additions or additional equipment for the additional tracks ...	100,000
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Total net proceeds	\$16,000,000
Total debt discount	4,000,000
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Proposed bond issue	\$20,000,000

It will be noted that of these requirements, \$3,467,000 are required for equipment of the railroad for initial operation and that the entire balance will be applied to additions and additional equipment, one of the principal items being for the purchase of 150 steel cars which this Commission has directed the petitioner to put into operation on the road not later than December 31, 1927, and which, together with the 213 cars in process of delivery, are estimated to cost approximately \$9,000,000.

Under the terms of the contract with the city of New York, known as and which will be referred to hereafter as Contract No. 4, the debt discount that may be included by the company in cost on account of the proceeds to be used for equipment of P.U.R.1928B.

the railroad for initial operation is limited to 3 per cent. The entire debt discount or cost of securing the required funds applicable to the balance of the above items, except the \$1,282,000 item, possible to charge against the city, may, however, be included in cost. The latter, which may be so included, amounts to \$3,133,250 on \$12,533,000 of proceeds proposed to be used for additions or additional equipment. The total cost for additions would be, therefore, \$15,666,250.

The petitioner is entitled to a revenue deduction on the cost of additions (Article XLIX, paragraph 8, and Article LXX, paragraph 2) of the actual interest payable plus 1 per cent for sinking fund. The revenue deductions on the above stated cost of additions would be 6 per cent, (5 per cent interest and 1 per cent sinking fund) or \$939,975 per annum.

In the event that the city recaptures the railroad, the additional tracks and/or elevated extensions, or in the event in the fruition of any readjustment plan in which the respective equities of the company and the city are based on the cost of recapture, the price at which the proposed bonds are issued will have a vital effect on the city's interests. It is proposed to use \$11,251,000 of such proceeds for additions and additional equipment to recapturable properties. If the bonds are issued at 80, the debt discount applicable to such portion of the proceeds will be \$2,812,750. In the event of recapture shortly after the provision of the proposed additions, the city is obligated to pay for the retirement of the bonds now proposed to be issued 107.5 per cent of the actual base cost of the proposed additions, and in addition thereto 107.5 per cent of the \$2,812,750 debt discount applicable to such additions so recapturable. Thus the city will have to pay \$3,023,700 on account of the portion of the proposed debt discount applicable to these recapturable additions.

Paragraph ninth of the petition (p. 13) states as follows:

"Your petitioner further alleges that it has entered into a contract with Brooklyn-Manhattan Transit Corporation, by which said corporation *agrees to purchase or to procure purchasers* (italics ours) for and your petitioner agrees, subject to obtain-P.U.R.1928B.

ing the consent of your Commission, to issue under its refunding mortgage and to sell and deliver, at a price calculated to yield an interest return of at the rate of but not exceeding $6\frac{1}{2}$ per cent per annum to maturity, additional refunding mortgage 5 per cent sinking fund gold bonds, series A, due July 1, 1968, to an aggregate principal amount which, at said price, will raise funds sufficient for the purposes specified in paragraphs seven and eight of this petition; namely, \$16,000,000. The correspondence between your petitioner and said corporation forming the basis of said contract will, *if required*, be submitted in connection with this application."

Upon the production of the original document referred to in paragraph ninth it appears that the alleged contract is in the form of the following letter from the Brooklyn-Manhattan Transit Corporation to the petitioner:

"April 18, 1927.

"New York Rapid Transit Corporation,
85 Clinton Street,
Brooklyn, New York,
Dear Sirs:

We understand that you intend to apply to the Transit Commission for its consent to the issue of additional refunding mortgage five per cent sinking fund gold bonds, series A, under your refunding mortgage to the Chase National Bank of the city of New York, as trustee, to an aggregate principal amount not exceeding \$20,000,000, and upon obtaining the consent of said Commission, to issue and dispose of such additional bonds from time to time for the purpose of reimbursing your treasury for capital expenditures already made and of providing for capital expenditures required to be made for construction and/or equipment under the subway contract (Contract No. 4) with the city of New York and/or the related certificates for additional tracks and for extensions.

We hereby offer, upon and subject to the terms and conditions hereinafter stated, to purchase or procure purchasers for such additional refunding mortgage 5 per cent sinking fund gold bonds, series A, up to but not exceeding \$20,000,000 aggregate.
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gregate principal amount at the price of 80 per cent of the principal amount thereof and accrued interest, payment of the purchase price to be made at the principal office of the Chase National Bank of the city of New York, No. 57 Broadway, borough of Manhattan, against delivery of the bonds in temporary or permanent form at any time or from time to time during a period of one year and six months from the date hereof, in each instance on ten days' notice to us or such shorter notice as we may prescribe and in lots of not less than \$500,000 principal amount.

It is understood that our obligation hereunder to purchase or procure purchasers for said bonds or any of them is and shall be subject to your obtaining the requisite consent of the Transit Commission and to the approval by our counsel of all legal details in connection with their validity, issue, and delivery. In this connection we undertake, as the owner and holder of record of more than two-thirds of your entire issued and outstanding capital stock, to give or cause to be given such stockholder's consent as may be required.

It is further understood that if at any time during the period above mentioned the security or investment market in New York shall be so affected by political, financial, economic, or other conditions as, in our opinion, to make it inadvisable to issue or sell any of the bonds then remaining unissued or unsold, or to make it impossible for us to finance their purchase except at a loss, then we shall have the right to terminate this obligation and decline to accept delivery of any further bonds hereunder.

This offer is handed to you in duplicate. If it is acceptable to you, please confirm by signing the acceptance at the place indicated below and return to us one of the duplicates.

Very truly yours,

Brooklyn-Manhattan Transit Corporation

By (Signed) W. S. Menden

President

Brooklyn, New York, April 18, 1927.

The foregoing offer of Brooklyn-Manhattan Transit Corporation is hereby accepted, subject to the undersigned obtaining P.U.R.1928B.

the consent of the Transit Commission of the Department of Public Service—Metropolitan Division—and any necessary consents of its stockholders to the issue and delivery of its refunding mortgage 5 per cent sinking fund gold bonds, series A, mentioned in said offer.

New York Rapid Transit Corporation
By (Signed) George D. Yeomans
Vice President."

This is not in point of fact a contract but a mere option for fifteen months to the Brooklyn-Manhattan Transit Corporation from its subsidiary to the exclusion of other possible bidders and without reference to improved market conditions for bonds, to purchase or not to purchase the bonds as the Brooklyn-Manhattan Transit Corporation may see fit. After repeated objection to this document by the city as not constituting a contract but a mere option, and toward the close of the Hearings upon this application, the Brooklyn-Manhattan Transit Corporation caused a resolution to be adopted by its board of directors intended to convert this option into a contract for the purchase of the bonds.

[1] The city of New York has a present investment of about \$176,000,000 in the city-owned railroad, as against the investment of the petitioner in the same property-construction, \$14,200,000; equipment, \$38,200,000; total, \$52,400,000. The city has received nothing by way of interest, amortization, or otherwise from its investment whilst the petitioner is now receiving a large annual net profit above all fixed charges. The city strenuously opposes the present application on the grounds (1) that the terms of the proposed sale by the petitioner to its parent company are improvident, inadequate and unfair to the city; (2) that the city as lessor and as a partner with the petitioner in the property with a permanent interest many times that of the petitioner is vitally affected by the proposed transaction and would be greatly injured in the assertion of its contract rights by its consummation in the event that the city should exercise the right reserved to it to recapture the property upon which the bulk of these expenditures are to be made; P.U.R.1928B.

(3) that the petitioner is highly prosperous and has ample means of financing the requirements for which this proposed bond issue is proposed without resort to what the city charges to be a disastrous method of financing as against it.

After the reorganization of the Brooklyn Rapid Transit Corporation, the property and assets of said company's subsidiary the New York Consolidated Railroad Company were transferred to the New York Rapid Transit Corporation, which company was authorized to issue securities as follows:

5 per cent first and refunding mortgage bonds which constitute a prior lien upon all of its property, to the amount of \$73,000,000.

Of this issue, there has been set apart for exchange for a like amount of mortgage bonds now outstanding, upon the elevated railroad lines owned by the petitioner, \$23,000,000.

The balance of this authorized issue of bonds may be used from time to time whenever in the judgment of the board of directors of the company, its second refunding bonds cannot be marketed on reasonable terms of \$50,000,000. \$73,000,000.

It was also authorized to issue 5 per cent refunding bonds to the amount of \$350,000,000.

Of these bonds there were originally issued \$93,508,500, of which \$91,164,500 were outstanding March 31, 1927, \$307,000 being in the sinking fund, and the balance of \$90,857,500 being practically all owned by the Brooklyn-Manhattan Transit Corporation, of which the New York Rapid Transit Corporation is a subsidiary.

At March 31, 1927, the New York Rapid Transit Corporation had issued no-par value common stock to the amount of 282,760 shares.

The following is a statement of its gross income since its organization and the payments made on its outstanding securities:

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Period.	Gross Income.	Fixed Charges.*	Net Corporate Income.
June 15 to June 30, 1923	\$349,774	\$60,586	\$289,188
Year ended June 30, 1924	8,257,067	5,764,085	2,492,982
" " June 30, 1925	9,776,482	5,915,368	3,861,114
" " June 30, 1926	10,658,926	5,974,804	4,684,122
" " June 30, 1927	11,777,714	5,989,370	5,788,344
Total	\$40,819,963	\$23,704,213	\$17,115,750

* Principally bond interest, includes small amount of rents and other interest.

Period	Net Corporate Income.	Dividends.	Balance after Dividends.
June 15 to June 30, 1923	\$289,188	.....	\$289,188
Year ended June 30, 1924	2,492,982	.....	2,492,982
" " June 30, 1925	3,861,114	\$3,024,000	837,114
" " June 30, 1926	4,684,122	4,503,520	180,602
" " June 30, 1927	5,788,344	4,524,160	1,264,184
	\$17,115,750	\$12,051,680	\$5,064,070

The directors of the petitioner being of the opinion that the terms of the proposed sale of the refunding bonds to its parent company at the price of 80 are reasonable have refused to pass a resolution authorizing the issue, sale, or negotiation of any part of the first and refunding bonds to raise the funds required for the above indicated purpose.

The city of New York insists on the other hand that the needs of the petitioner should be met by the sale of these bonds and that they can be sold so as to realize a net return of from 95 to 97 per cent of the par value.

On the basis of a sale at 95, it would require only \$16,842,000 of these bonds to yield the money now needed by the petitioner as against \$20,000,000 of the refunding bonds now proposed to be issued for that purpose and that in view of the fact that in the event of the exercise by the city of its right to recapture the issue of the refunding bonds would involve a loss to the city of \$2,387,000 over and above the amount involved in the negotiation of the first and refunding bonds and that the granting of the application now made would be, therefore, unjust and burdensome to the city.

As to so much of the proposed issue the proceeds of which are applicable to additions or for other purposes incident to initial operation upon which a debt discount of not exceeding 3 per cent in any event would be chargeable against the city, and the P.U.R.1928B.

balance of which would be borne solely by the petitioner, the city would ordinarily make no objection since the petitioner insists and the city agrees that its interests would not be affected materially thereby so far as concerns the city. The objection is to the proposed bond issue applicable to additions and additional equipment amounting in all to \$15,666,000 par value of bonds of the proposed issue of \$20,000,000.

[2, 3] The Commission is not impressed by the testimony or the argument to the effect that the sale at this time of first and refunding bonds to yield \$16,000,000 would constitute a breach of faith toward the holders of the 6 per cent Bonds of the Brooklyn-Manhattan Transit Corporation. It is said that the first and refunding bonds were intended to remain unissued except in the event of an emergency in the affairs of the company. Mr. Dahl testified that if the bonds now proposed to be sold could not be sold at more than 70 or 75 he would regard that as an emergency that might justify the sale of the first and refunding bonds, but that so long as the former can be sold at 80 he was of the opinion that there is no such emergency. To this the Commission cannot agree. It is of the opinion that where a company is as prosperous as is this company, with net earnings above fixed charges of almost \$6,000,000 and pays annual dividends of \$4,500,000 its 5 per cent bonds should be salable on a far better basis than that on which the parent company has attempted to acquire them. This is especially true where the bonds so to be acquired can be used in connection with a sinking fund at a price equal to that at which the Brooklyn-Manhattan Transit 6's are now being freely sold.

Inasmuch as this issue of first and refunding bonds was authorized as part of the plan of reorganization and every holder of the Brooklyn-Manhattan Transit 6's knew of that fact when he bought his bonds, we fail to see where there would be any possible claim of want of good faith in issuing them at this time, especially as an amount in excess of \$33,000,000 of the bonds would still be left subject to the control of the company to meet emergencies.

The city argues further that the petitioner has other and far

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less onerous means as against the city and in its own interest of securing the funds now needed through the issue of equipment car trust notes that could be sold at par or better on a 5 per cent basis, if the petitioner were willing to pay 20 per cent of the cost of equipment in cash and to secure the payment of the balance by the issue of serial equipment car trust notes in ten equal annual instalments beginning in 1930.

It is further contended that whatever may be the method of furnishing the money requirements, the securities that are now proposed to be sold by the petitioner should be offered for sale by competitive bidding. In support of that contention the city invokes Article XXII. of Chapter V. of Contract No. 4, which reads as follows:

"Article XXII. The lessee shall (except in such cases where permission to do otherwise is expressly granted from time to time by the Commission by a resolution evidenced by entries in its minutes) before entering into any contract, agreement, mortgage or undertaking having to do with the enterprise of contributing toward the cost of construction of the railroad or equipping the railroad, or reconstructing, extending, or equipping the existing railroads, submit the same to the Commission for its approval and the Commission may as a condition of its approval require the insertion of such terms and conditions therein as it may deem necessary. The Commission may further require the lessee before entering into any agreement having to do with the enterprise of contributing toward the cost of construction of the railroad or equipping the railroad, or reconstructing, extending, or equipping the existing railroads to ask for proposals upon forms of contracts satisfactory to the Commission, in a specific manner and for a specified time."

In order to avoid the question raised by the petitioner as to its right to issue these equipment car trust notes under its contract with the city, the city has expressed its willingness to agree to such a method of financing.

As bearing upon the credit of the petitioner and its ability directly or through its parent company to finance the purchase of additional equipment for the railroad and extensions, which P.U.R.1928B.

amounts to \$11,151,000 of the total of \$16,000,000 proposed to be raised, the following facts appear:

All the share capital of the petitioner is owned by the parent company directly or through a subsidiary, and practically all of its outstanding bonds are owned by the parent company which has issued, as against the \$91,000,000 of bonds of the petitioner that it holds, its own 6 per cent bonds for substantially an equal amount. The net earnings of the parent company for the two years ended June 30, 1926 and 1927 over and above all its fixed charges are as follows:

For the year ended June 30, 1926—\$5,904,390.

For the year ended June 30, 1927—\$6,042,668.

The parent company has outstanding about 250,000 shares of 6 per cent preferred stock upon which annual dividends amounting to approximately \$1,500,000 are being paid and approximately 770,000 shares of no-par common stock upon which it earns approximately \$5.72 per share or \$4,400,000, and pays annual dividends of \$4 per share amounting to \$3,080,000, so that it is well able if it chooses to do so, to finance the payment for additions and additional equipment for the railroad out of its earnings if it prefers that course to the issuing of first and refunding bonds.

[4] The Commission has reached the conclusion that the present application should be denied on the grounds urged by the city. The damage that may result to the city upon the issuance of the \$20,000,000 of bonds in the event of the exercise of its rights of recapture, which it claims has already matured, is in no sense fanciful or exaggerated but a stern reality. True, the petitioner insists that the city's right of recapture has not matured, and this the city denies. It would not be proper nor is it necessary for the Commission at this stage to express any opinion on that question. It is sufficient for the purpose of this application that the right of recapture is expressly provided for and reserved by the terms of Contract No. 4 and that in the event of the exercise of that right the proposed financing might involve the retirement of the refunding bonds at a premium of 7½ per cent and impose upon it, upon the retirement of the bonds now proposed to be issued for additions or addi-

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tional equipment for the railroad, the payment of \$3,833,000 over and above the sum realized therefrom.

[5] The petitioner challenges the power of the Commission to inquire into the reasonableness or merits of the proposed sale, claiming that it amounts to a substitution of the judgment or discretion of the Commission for that of the Board of Directors with whom it is lodged and in support of that view it cites the case of *People ex rel. Delaware & H. Co. v. Stevens*, 197 N. Y. 1, 90 N. E. 60. In our judgment that case has no application to the exceptional situation that exists here. In the *Stevens* case, *supra*, the burden of an improvident bargain was borne solely by the stockholders of the Delaware & Hudson Company, who were represented by its board of directors. No other interest was involved or affected. Here the petitioner has a partner with an investment in the property many times greater than its own, and one who is in many other ways vitally concerned and may be gravely injured by the proposed financing.

(2) The petitioner is a mere creature of the Brooklyn-Manhattan Transit Corporation which proposes to take these Bonds at 80 cents on the dollar. Its officers and board of directors are the same as those of the parent company and are named by the latter. There has been and can be no bargain or negotiation between the two companies as to the price at which these bonds should be sold. The parent company is both the seller and the buyer. It is selling the bonds to itself at a price and upon terms fixed by it. It is admitted that it has made no effort to sell the bonds elsewhere or to get a bid for them. If it acquires them, it may, under the terms of § 2 of Article 5 of the mortgage to secure these refunding bonds sell them to the trustee of the sinking fund of its subsidiary at the prices at which the Brooklyn-Manhattan Transit Company 6 per cent are selling which now is about 97. In other words, they may acquire the bonds as against the interests of the city at 80 and turn them into the sinking fund at 97 or whatever may then be the market value of the bonds of the parent company that are partly secured by the deposit of this issue of bonds. The testimony shows that the Brooklyn-Manhattan Transit Corporation recently sold to

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the Chase National Bank, as trustee, bonds of the same authorized issue at a price of 98.8679.

[6] (3) Under Chapter V, Article XXII of Contract No. 4 above quoted, the Commission has the right to require that if these bonds are to be sold they should be disposed of by competitive bidding. That valuable provision was inserted in the contract for the protection of the city against the form of improvidence that is represented by the present proposal.

For the reasons above stated the application is denied. The Commission finds that the petitioner has ample means of financing this transaction and takes this occasion to repeat that it will insist upon its prompt compliance with the order of December 22, 1926 requiring it to place the 150 steel cars in operation not later than December 31, 1927. The petitioner has ample means with which to comply with that order by either of the methods above indicated or by way of advances out of its own ample earnings if it so elects.

Note.—In *Re New York Rapid Transit Corp.* Case No. 2890, Oct. 31, 1927, the New York Transit Commission approved a petition of a traction utility for consent to issue \$17,000,000 principal amount of "refunding mortgage six per cent sinking fund gold bonds." The approval was made with the express provision that any portion of debt discount and expense in connection with the sale of the securities should not be included in "cost" either under the utility's contract with the city or under its certificates of operation, such purposes not being reasonably chargeable in whole or in part to operating expenses or to income.

PENNSYLVANIA PUBLIC SERVICE COMMISSION.

RE GETTYSBURG FLYING SERVICE, INCORPORATED.

[Application Docket No. 17501.]

Aviation — Regulation of new service — Factors considered.

1. Certain general rules of regulation of aircraft rather than a complete set of rules and regulations were adopted by the Commission in view of its experience with the administration of transportation service in general, p. 288.

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Aviation — Factors to be considered in successful operation.

2. Commercial aviation to be profitable and popular must be safe, convenient, comfortable, reliable, and not too expensive, p. 288.

Aviation — Requirements of landing field.

3. Landing fields, whether publicly or privately owned, must be more than mere open spaces where planes may alight, and should have conveniences similar to those provided at railroad stations, p. 289.

Aviation — Standards of equipment — Qualification of pilot.

4. The Commission temporarily adopted as its standard of equipment and qualification of pilots the standards prescribed by the Federal Government and the State Aeronautics Commission, p. 289.

[December 6, 1927.]

APPLICATION of an air taxi utility for certificate of convenience and necessity approving of its incorporation, organization, and creation; certificate issued.

By the **Commission**: This application is one of a number of proceedings now before the Commission for approval of the incorporation of public service companies for the purpose of transporting persons, freight, and merchandise by means of airplanes.

[1] Transportation by aircraft in Pennsylvania being an untried venture in the field of common carrier service, it is expedient and advisable to formally make known our views and administrative policy with respect to this new service. The experience of the Commission in its administration of transportation service by means of motor vehicles is convincing that a complete set of rules and regulations, governing aircraft transportation, cannot at present be adopted and promulgated. Certain general rules of regulation will be followed, and, as the service develops and new problems and conditions arise, changes and modifications therein will be made. The safety and convenience of the public will be given first and primary consideration. The Commission also recognizes the manifest necessity of permitting the company such control of operation as may best develop the service.

[2] Commercial aviation to be profitable and popular must be safe, convenient, comfortable, reliable and not too expensive. Responsible companies operating in the United States and other countries carry thousands of passengers daily and have demon-

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strated that the airplane of today provides safe, convenient, and reliable means of air transportation.

This applicant has carried 16,000 persons in the period of approximately two months without injury to a passenger and with but one forced landing.

[3] The landing fields or airports, either municipally owned or provided by the company, must be more than open spaces where the 'planes can land and the passengers alight; they must have the conveniences similar to those provided at railroad stations, with adequate space for parking automobiles under proper police regulation.

The practice of the Commission requires, on applications of this character, the filing of two petitions; one for approval of the incorporation of the proposed company and the other for the beginning of the exercise of the rights and privileges of the company or, in other words, the approval of the service which the company desires to furnish. The petition for approval of incorporation will be granted in such cases as the testimony conclusively establishes necessity for the service by the applicant and the financial ability of the proposed company to purchase the necessary equipment and provide adequate landing fields.

On the application for exercise of the rights and privileges only such rights and privileges will be granted as the testimony shows the company is prepared and forthwith proposes to exercise.

[4] The Commission will adopt for the present as its standards of equipment and qualification of pilots the standards prescribed by the Federal Government and the State Aeronautics Commission, and require the company to file proof that it has or will comply therewith.

The rights granted will be limited to a period of one year, with the privilege of applying for renewal without formal hearing, unless otherwise ordered, upon filing with the Commission a petition containing the data and information which the Commission shall require, and conditioned upon the applicant carrying liability insurance for the protection of the passengers and the public generally, and filing monthly statements covering the number of passengers carried and service furnished.

Until the applicant has definitely shown the nature and character of the service desired to be furnished, and has made arrangements for a landing field or of the purchase of 'planes, action on the petition for the beginning of the exercise of the rights will be withheld for a reasonable period of time.

The Gettysburg Flying Service, Inc., has established the necessity for the service, and its financial responsibility and the application for approval of incorporation is approved. It is the intention of this company for the present to limit its service to transporting persons on sight-seeing trips over the Gettysburg battlefield and a taxi service from Gettysburg to points and places in Pennsylvania. The company having provided itself with suitable landing fields and planes, the application of the company for the beginning of the exercise of said sight-seeing and taxi rights and privileges, subject to the above condition, is also approved. An appropriate order will issue.

WEST VIRGINIA PUBLIC SERVICE COMMISSION.

RE CLARKSBURG LIGHT & HEAT COMPANY.

[Case No. 1742.]

Return — Right to earn — Natural gas service.

1. The owner of natural gas property which the public is entitled to use is entitled to just compensation from the public by way of rates for such use, p. 295.

Return — Factors considered — Valuation.

2. The value of the property of a public utility used in its public service business must be ascertained to determine whether the return is fair, p. 296.

Return — Basis — Fair value — Investment.

3. The present fair value rather than the amount of money invested in utility property is the basis on which to calculate rates, p. 296.

Valuation — Gas well construction — Charges to operating expense.

4. Charges for the cost of labor, hauling freight, and similar items incurred in the drilling of natural gas wells should not be included in the rate base of a natural gas utility when these items have been charged to operating expense, p. 296.

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Valuation — Measures — Reproduction cost.

5. The use of estimates of the cost of reproducing utility property, less accrued depreciation, is not the sole method of proving present value, although such estimates are to be given major consideration, p. 298.

Valuation — Mains and pipes — Actual costs — Quotations.

6. The actual cost of pipe of a natural gas company, in the regular course of business and at the date of the appraisal, is to be preferred as a basis on which to arrive at value over theoretical prices based on general quotations of manufacturers or dealers, where a public utility company through its affiliations is enabled to secure its material advantageously, p. 299.

Valuation — Cost of trenching and backfilling — Natural gas lines.

7. The actual dimensions of a trench are to be preferred to estimates in calculating the cost of trenching and backfilling for the purpose of laying natural gas pipes, p. 301.

Valuation — Reproduction cost — Test of figures.

8. The actual cost of additions to a plant during recent months may be applied as to test to reproduction cost figures, p. 301.

Valuation — Determination of reproduction cost — Estimates — Book costs.

9. An engineer's estimate of probable costs should not outweigh the costs set up on the books of a public utility which are required to be kept in accordance with a uniform classification, in determining reproduction cost, although this test of reproduction cost estimates is not to be confused with "book costs" and "investment" at some date remote from the date of inquiry, p. 302.

Valuation — General overheads — Natural gas utility.

10. Reasonable sums should be estimated for additional expenses for purchasing materials, warehousing, omissions and contingencies, loss and waste of fittings, supervision, field accounting, use and loss of tools, and insurance in the theoretical rebuilding of a natural gas plant to determine reproduction cost, p. 310.

Valuation — Overheads — Interest during construction.

11. Interest at 6 per cent per annum for half the period of theoretical construction is a legitimate item of overhead costs in ascertaining reproduction cost of natural gas property, p. 311.

Valuation — Overheads — Administration — Legal and commercial costs — Taxes and insurance during construction.

12. Cost of the nucleus of an administrative system of general offices of a natural gas company, legal and legitimate commercial costs, and taxes and insurance during construction may be estimated at 3 per cent in determining reproduction cost, p. 311.

Valuation — Overheads — Natural gas property.

13. A total overhead cost of $7\frac{1}{2}$ per cent may be estimated on the physical plant of a natural gas company, in addition to direct overheads included in an appraisal, except on rights of way, p. 311.

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Valuation — Overheads — Engineering and engineering supervision.

14. An allowance of 5 per cent was estimated for engineering and engineering supervision on field, transmission, and distribution lines of a natural gas company, p. 311.

Depreciation — Accrued — Gas well equipment.

15. The cost of salvaging equipment, the cost of complying with a law requiring abandoned wells to be securely plugged, and the loss of the cost of labor and material upon the abandonment of property must be considered in ascertaining the accrued depreciation of gas well equipment, p. 312.

Depreciation — Accrued — Items for overheads.

16. Depreciation should be applied to the theoretical cost of utility property new including those items for overheads which have been included in the estimates of such cost, p. 314.

Valuation — Leaseholds and natural gas rights — Market value.

17. An estimate of the value of natural gas leaseholds based upon estimates of the market value of gas leases and upon the difference between the market value of the estimated gas in the ground and the cost of producing it, was rejected on the ground that market value is not a proper measure of the value of utility property other than land and buildings, p. 316.

Valuation — Leaseholds and natural gas rights.

18. Leaseholds and natural gas rights of a natural gas utility were valued at book cost, in the absence of competent proof of appreciation of the original cost, and in view of the further fact that the public had paid large amounts in rates on account of rentals and royalties for gas rights, p. 316.

Valuation — Going concern value — Percentage basis.

19. The Commission does not look with favor upon the practice of estimating going value on a flat percentage basis without convincing proof of the presence of a value in excess of the fair value of the utility's property, and exclusive of good will, franchise rights, and similar elements of value that are excluded from the rate base of public service corporations because of their monopolistic position in the community, p. 320.

Valuation — Going concern value — Natural gas utility.

20. An allowance may be made for going concern value from all the evidence before the Commission, if it is possible to do so, although no sum has been proved to be assigned for that value, p. 321.

Valuation — Working capital — Materials and supplies — Effect of billing.

21. An allowance was made for working capital of a natural gas company based upon the average monthly operating expenses, together with an allowance for necessary supplies and working balance, where the utility collected its bills daily on monthly billings of gas consumed, in a sense doing a cash business, p. 321.

Commissions — Evidence — Admissions by witnesses.

22. Commission proceedings differ from court proceedings in that P.U.R.1928B.

the state cannot be limited in its prerogative to regulate rates by the admission of any witness, p. 322.

Depreciation — Natural gas property — Amortization.

23. An annual charge for amortization of physical property of a natural gas company based on the estimated cost of reproduction new less observed deterioration less the value of salvable property, with no allowance for amortization on distribution system property upon the assumption that this property might be adapted to the service of mixed or manufactured gas after the exhaustion of natural gas, was disapproved, partly because of the adequate provision made in the past for amortization, p. 322.

Return — Operating expenses — Cost of drilling gas wells.

24. Expenditures for labor and expenses in drilling new gas wells should be charged to gas well construction account instead of to operating expenses, p. 325.

Depreciation — Necessity of charge — Retirements.

25. Operating charges should be sufficient to take care of the depreciation and provide for the retirement of the additions to capital that are necessarily made from year to year, including gas well construction costs in the case of a natural gas utility, p. 325.

Return — Operating expenses — Rate expenditures — Amortization.

26. The expense of conducting a rate case before the Commission was considered a legitimate charge against operating expenses and was amortized over a period of five years, p. 326.

Discrimination — Rates — Concessions to cities and other corporations.

27. The practice of granting lower rates for public utility service to municipal and other public corporations is discriminatory, p. 328.

Return — Natural gas — Percentage allowance.

28. Natural gas rates calculated to produce a net return of 7.928 per cent upon the fair value of the property were approved, where with a possible improvement in industrial consumption a return of more than 9 per cent might be earned, p. 328.

(DIVINE, Commissioner, dissents.)

[December 23, 1927.]

INVESTIGATION and suspension of rates, rules, and regulations for furnishing natural gas; new rate schedules established.

Appearances: R. S. Douglass and Lynch & Lynch, (M. G. Sperry, on brief), of Clarksburg, for Clarksburg Light & Heat Company, the respondent; Fred L. Shinn, Clarksburg, for city of Clarksburg, protestant; G. H. Duthie, Clarksburg, for city of Clarksburg and Central Labor Union and associated unions, pro-P.U.R.1928B.

testants; C. L. Greathouse, Clarksburg, for town of Nutter Fort, protestant.

Coffman, Chairman: This case is a proceeding under § 9 of the Public Service Commission Act wherein the Commission has entered upon a hearing concerning the propriety of the rates for furnishing natural gas in the city of Clarksburg and vicinity, including the town of Nutter Fort, stated in a schedule or tariff filed by the Clarksburg Light & Heat Company January 13, 1927, to become effective March 1, 1927, and designated P. S. C. W. Va. No. 4, cancelling P. S. C. W. Va. No. 3 stating the rates then in effect.

The tariff so filed states a change in the rate for gas for domestic and commercial use from 30 cents net per thousand cubic feet for the first 30,000 cubic feet consumed per month, 33 cents for the next 10,000 cubic feet and 38 cents for all over 40,000 cubic feet, to 50 cents per thousand cubic feet. It states no change in the rate of 40 cents per thousand for industrial and manufacturing use and 21 cents per thousand for use by municipalities and the county, and in school buildings.

The change in rate for domestic and commercial consumption has been suspended and the use of the proposed rate deferred pending the hearing and decision of this case.

The burden of proving that the rates stated in the tariff are just and reasonable was upon the respondent gas company, and it offered evidence for that purpose. The Commission's accountants made a thorough investigation of the company's financial affairs, and the protestants offered testimony to rebut the respondent's proof. The record consists of the transcript of oral testimony, 1782 pages, numerous exhibits running to many hundreds of pages, and briefs of argument filed by counsel. Oral argument was heard October 5, 1927, and the case was submitted on that day.

A practice has grown up among regulatory Commissions to indulge in discussions of the law and facts involved in Commission cases, somewhat after the manner of a court. Our statute provides that when an order of the Commission is reviewed by the supreme court of appeals, "the Commission shall file with the P.U.R.1928B.

court before the day fixed for the final hearing a written statement of its reasons for the entry of such order." This report, however, is not to be taken as an imitation of the courts, nor as a compliance with the statutory provision just mentioned. The citizens who are served with natural gas by the respondent, as well as that corporate citizen itself, are entitled to a general statement of the Commission's conclusions on the evidence in this case.

Revenue of the Gas Company

[1] The law is so well understood that it need not be more than restated that the public is entitled to the use of the private property of a natural gas company furnishing gas for lighting, heating, and power purposes; and that the owner of such private property, the use of which is so taken by the public, is entitled to just compensation from the public by way of rates for such use.

Mr. E. V. Williamson, statistician of the Commission, made and filed a report on the books and accounts of the respondent. These books and accounts are kept under rules specified by the Commission, and the law prescribes severe penalties for falsification of these or other records of a public service corporation. No serious objection was made to the report of the statistician by the respondent or by the protestants, and it will be assumed that it states correctly the financial history of the respondent.

The statistician's report shows that, since 1921 when the present gas rates at Clarksburg were fixed by agreement between the gas company and the municipality and its domestic and industrial consumers, the revenues and expenses of the company have been as follows:

		Operating revenues.	Operating expenses.	Net Operating income	Less Gas Well construction costs.	Readjusted net income.
1922	....	\$1,076,865.16	\$653,938.77	\$422,926.39	\$26,998.91	\$395,927.48
1923	....	1,247,171.50	809,129.39	438,042.11	42,423.92	395,618.19
1924	....	1,210,583.88	932,988.58	277,595.30	33,103.74	244,491.56
1925	....	1,017,306.05	765,921.33	249,384.72	44,364.10	205,020.62
1926	....	955,866.85	837,915.56	117,951.29	29,881.34	88,069.95

In the year 1926, the consumption of gas by domestic and commercial consumers, whose rates are here sought to be increased from an average of 30.56 cents, net, to 50 cents, net, amounted to 1,577,918 M cubic feet. Applying the proposed P.U.R.1928B

increase to this consumption would result in an annual increase in the net operating income of the respondent of \$306,747.26 for the future provided the consumption remained the same as it was in 1926.

[2] In order to determine if the probable income of the respondent under the proposed rates will constitute a just compensation for the use of its property by the public and, therefore, will be fair to it and to the public, or if such income will be more than a just compensation for the use of its property and, therefore, unfair to the public, it will be necessary to ascertain the value of the respondent's property used in its public service business. Valuation is necessarily the crux of rate cases.

Valuation

[3] It is no longer contended by Commissions representing the public, or approved by the courts announcing the law, that the amount of money invested in utility property is the basis on which to calculate rates to be paid for its use by the public. It is the present fair value of the property of the respondent that is to be determined here. Counsel for all the protestants correctly state the proposition in their briefs when they say "the applicant is entitled to a fair return on the fair value of its property now used and useful in the public service."

Counsel for the gas company conclude their brief of argument with this contention:

"That the present fair value of the property of the applicant now used and useful in its service, . . . after deducting all costs of labor of drilling wells, is at least \$3,900,000; that the present fair value of such property, including the cost of drilling wells is at least \$4,482,000."

[4] It may be noted here that this company has heretofore sought to have the Commission treat as an operating expense, to be included in the rates charged the public, the cost of labor, hauling, freight and similar items incurred in the drilling of its wells. The Commission agreed to that policy in 1916 and based rates on that practice. The respondent, therefore, very properly takes the position that although the wells on which these charges for labor, etc., were expended constitute a part of its P.U.R.1928B.

property, yet, in view of the equities arising from this understanding with the ratepayer, the account known in the Uniform Classification of Accounts as "Account 211, Gas Well Construction," and amounting to approximately \$800,000 by reproduction new estimate, should not be included in the present valuation of its property, provided the same policy of accounting is continued.

Counsel for the protesting municipalities contend, in concluding their argument, that a fair valuation of the property is not to exceed \$2,274,974.

Ford, Bacon & Davis, Incorporated, New York, a nationally known firm of engineers, was employed by the respondent to make a report of the value of its property as of June 30, 1926. Such a report was filed by Mr. F. H. Lerch, Jr., an experienced engineer connected with the firm, who, together with others associated with him, also gave oral testimony and filed numerous other exhibits. His estimates of value were based on the cost of reproducing the physical property new, less "observed deterioration," on the market value of land, and on a method of valuation of leaseholds and natural gas rights which will be hereafter described.

The city of Clarksburg employed Mr. C. P. Collins, of Clarksburg, also an experienced engineer, to check the valuation as set forth in the report of Ford, Bacon & Davis; and Mr. Collins also filed a report containing his estimate of valuation, based on the cost of reproducing the physical property new, less "observed deterioration." He offers no criticism of the estimates of Ford, Bacon & Davis of the reproduction cost of rights of way, general structures, meters, and meter installation, regulators and general property. He differs, however, from that firm's estimates of the value of land and of the reproduction cost of compressing station structures and equipment, of gas well equipment, and of field, transmission and distribution system pipe lines. The engineers also differ in their calculations of overhead costs and going value.

A summary of the estimates of reproduction cost new of the company's property, without regard to the cost of construction of gas wells and not including leaseholds and natural gas rights, P.U.R.1928B.

and of reproduction cost less "observed deterioration," is as follows:

[Tables omitted.]

Mr. Lerch subsequently filed a supplementary report (Lerch Exhibit No. 7) covering additions to and abandonments of property from June 30, 1926, to December 31, 1926. A summary of the estimates as of the latter date, as the Commission understands them, and with estimates of overhead costs claimed in connection with the several classes of property, is as follows:

[Tables omitted.]

To the above total [\$2,657,005] for physical property, the respondent's engineers add \$943,003 for leaseholds and natural gas rights as of December 31, 1926, together with 10 per cent additional going value, \$94,300, and \$221,937 for working capital, a total rate base of \$3,916,245.

[5] The method of arriving at the present fair value of public service utility property by means of estimates of the cost of reproducing the same property new at prices for material and labor prevailing at the date of the valuation, less depreciation, if any, seems to be more and more in process of being adopted by state regulatory Commissions, in conformity to decisions of the United States Supreme Court; although the Interstate Commerce Commission in the St. Louis & O'Fallon Railway case has challenged the doctrine where the inability of the public to pay rail rates based upon the theory, with consequent disturbance to the business of the country, is involved in its application. 124 Inters. Com. Rep. 1.

It is not understood that making estimates of the cost of reproducing utility property, less accrued depreciation, is the sole method of proving its present value. It is one of the methods of determining value, and the supreme court has laid it down as evidence to be given major consideration, beginning with *Bluefield Water Works & Improv. Co. v. Public Service Commission*, 262 U. S. 679, 67 L. ed. 1176, P.U.R.1923D, 11, 43 Sup. Ct. Rep. 675, when this Commission was forbidden to enforce water rates in the city of Bluefield because in determining the rate base it "failed to give proper consideration to the higher cost of construction in 1920 over that in 1915 and P.U.R.1928B.

before the war and failed to give weight to cost of reproduction, less depreciation, on the basis of 1920 prices;" and continuing through a line of cases in the past five years to *McCardle v. Indianapolis Water Co.* 272 U. S. 400, 71 L. ed. 154, P.U.R. 1927A, 15, 21, 47 Sup. Ct. Rep. 144, when the positive language was used, "But in determining present value, consideration *must be given* to prices and wages prevailing at the time of the investigation."

If, then, great weight is to be given the evidence of engineers of the cost of reproducing the lines and system of the Clarksburg Light & Heat Company in obedience to the mandate of the supreme court, it becomes necessary to examine with great care the testimony of the engineers in this case and the report of the valuation made by them.

Aside from its leaseholds and natural gas rights, the respondent's property consists of equipment at 154 gas wells, connected with the fireplaces and furnaces of its customers by means of about 60 miles of field pipe lines in its production system, about 70 miles of pipe lines in its transmission system, about 104 miles of pipe lines in its distribution system and 9,843 service lines running from its distribution mains to the curb, together with structures and appliances for regulating the flow of gas and measuring it. This system of pipe lines also connects with the lines of various other producers of natural gas from whom the company purchases a part of its gas supply. It extends only a few miles from the city of Clarksburg. The inventory of the items making up the plant has been satisfactorily proved, and it is the valuation placed upon them that is to be carefully scrutinized.

Reproduction Cost of Pipe Lines

[6] By far the largest general class of property in the inventory is that including pipe lines in the several systems. Ford, Bacon & Davis's report states that in making the estimates reported therein, "the costs used were built up to conform with conditions which actually exist as to employment of labor, hauling of materials, clearing of right of way, size of gang and organization used by the company, and similar problems met P.U.R.1928B.

in construction work of this kind. Labor rates paid by the company are the bases in every instance." The prices actually paid by the company for pipe, taken from invoices rendered during the year 1926, were not taken as the bases for material prices, however, and the report further states that "material prices were obtained from quoted prices by representative concerns for purchase of pipe in large quantities."

Mr. Collins, for the most part, calculated the price of line pipe at what it actually cost the respondent during the year 1926 when the appraisal was made; and these prices are considerably lower than those used by Ford, Bacon & Davis. The evidence explains this variation by the fact that the respondent, because of its affiliation with the Standard Oil Company of New Jersey which owns 51 per cent of its capital stock, enjoys the purchasing facilities of that organization, and is thereby enabled to secure its material more advantageously. The respondent complains in its brief that Mr. Collins used these lower cost prices, but it must be conceded that the actual cost of pipe, in the regular course of business and at the date of the appraisal, is to be preferred as a basis on which to arrive at value over theoretical prices based on general quotations of manufacturers or dealers. Then, too, the basis of the political and economic policy by which giant corporations have come into existence rests, in part, upon the very fact of the advantageous purchasing facilities of such organizations. When these organizations happen to be engaged in public utility business, it is but fair that the public should share in the advantages of their facilities. Material prices should, therefore, be used in these valuations as actually paid by the respondent, and as set out in Mr. Collins's report with a slight adjustment of the discount to conform to the practice of the company. The effect of adopting these prices will be pointed out more specifically later in this report.

Common labor in pipe line construction is estimated at \$4.12 for a nine-hour day by the company's engineers, based on wages of \$4.25 per day to its regularly employed labor and \$4 for untrained labor. The engineer for the protestants estimated labor at \$3.60 per day. Other witnesses testified as to labor prices, and P.U.R.1928B.

the preponderance of the evidence appears to warrant the estimate of \$4.12 per day.

Mr. Lerch used an estimate of 3.79 cubic yards of earth as the performance of a laborer per day in ditching on field lines and 3 cubic yards per man-day on city distribution lines; while Mr. Collins estimated labor performance at 6 cubic yards per man-day. Officials in charge of engineering work for the city of Clarksburg testified to trench work in the city to a depth of 5 feet where the usual performance per man-day was 9.7 cubic yards in loam, and 6.75 cubic yards to 7.8 cubic yards under average soil conditions. The evidence abundantly supports the estimate of the protestants' engineer; and the effect of adopting his estimate will also be pointed out further in this report.

[7] Mr. Lerch, in his Exhibit No. 6 at page 40, gives the estimated sizes of the trenches in which the transmission, field and distribution lines are buried, in order to calculate the cost of trenching and backfilling. It is stated that the trench dimensions shown in the exhibit were determined by field observations and in actual practice. However, Mr. W. G. Von Gemmingen, also of the firm of Ford, Bacon & Davis, made numerous openings of these trenches to observe the condition of the pipe, and his report of the depth at which the lines are buried does not coincide with the estimated depth, as will appear from the following tabulation:

	Depth of trench.	
	Estimated.	Actual.
Transmission line, 4 inch	26 in.	10.50 in.
Transmission line, 6 inch	30 in.	25.17 in.
Transmission line, 8 inch	32 in.	32.00 in.
Transmission line, 10 inch	40 in.	37.75 in.
Distribution line, 2 inch	20 in.	19.25 in.
Distribution line, 3 inch	21 in.	16.87 in.
Distribution line, 4 inch	22 in.	24.80 in.
Distribution line, 6 inch	26 in.	28.66 in.
Distribution line, 8 inch	28 in.	32.03 in.

The actual dimensions of a trench are to be preferred in these calculations to estimates.

[8] Another test may be applied to the reproduction cost figures of the engineers—the actual cost of additions to the plant from July 1, 1926, to December 31, 1926, as shown by Lerch Exhibit No. 7. The following instance is in point.

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The unit prices of material only in Account 214, field line equipment is given at page 71 of Ford, Bacon & Davis's report. The largest item in the account is 120,374 feet of 4-inch pipe at \$0.4935 per foot, including fittings at 3.5 per cent of the cost of pipe. Lerch Exhibit No. 7 reports that from June to December, 1926, there was added to the company's plant 3,990 feet of 4-inch pipe at a cost of \$1,184.79, or \$0.29694 per foot, with additional charge on the books for "fittings, etc." of 17.73 per cent of the cost of the pipe, making a total cost of \$0.3495 per foot, 29 per cent less than the estimate of Ford, Bacon & Davis. Six other additions were made to this account, comparisons of which with engineer's estimates bring like results.

The books also carry a charge for the installation of these seven sections of field line pipe in Account 213, field line construction. The cost is entered at \$5,961.62, while the same construction at unit costs estimated by Ford, Bacon & Davis at page 70 of their report would have amounted to \$6,194.99, to which there is proposed to be added general overheads at 18.5 per cent.

[9] The significance of these entries in the accounts covering field line construction and equipment, may be seen from the following excerpts from the Uniform Classification of Accounts for Natural Gas Companies, under which the accounts of the respondent are kept:

"Cost of Equipment. The cost of equipment, unless otherwise indicated in the text of an equipment account, includes, in addition to the actual money purchase price thereof, investigation and inspection expenses necessary to such purchase; expenses of transportation when borne by the utility; labor employed, materials and supplies consumed, and expenses incurred by the utility in unloading and placing such equipment in readiness to operate; and like expenses incurred in excavating, trenching, refilling, repaving, and otherwise restoring to its original condition land in which equipment is located." Page 47.

"213. Field Line Construction. Charge to this account the cost of labor employed, materials consumed and expenses incurred by the utility in constructing pipe lines owned and used by it in collecting natural gas from wells and conveying it to P.U.R.1928B.

the compressing or boosting stations, or other points where the transmission system begins.

In the charges to this account include the cost of hauling, ditching, constructing supports, conduits, etc., laying pipe, refilling, repaving, damage to crops, fences, etc.; also the cost of tools consumed, other supplies used and expenses incurred in the construction of field lines.

Exclude from this account and charge to '214. Field line equipment' account the cost of pipe, collars, couplings, other fittings, gates, valves, and other equipment accessory to the field lines." Page 50.

"214. Field Line Equipment. Charge to this account the cost of field line equipment owned by the utility and used by it in collecting natural gas from wells and conveying it to the compressing or boosting stations or other points where the transmission system begins.

In the charges to this account include the cost of pipe, collars, couplings, other fittings, gates, valves, and other equipment accessory to the field lines.

Exclude from this account and charge to '213 field line construction' account the cost of labor employed, material consumed, and expenses incurred in installing field line equipment.

The records supporting the entries to this account shall be so kept that the utility can furnish information as to the diameter, length, weight, material, price, and date of installation of each field line; also the cost and date of installation of collars, couplings, and other fittings." Page 51.

It can not be said in this connection that the engineer's estimate of probable costs shall outweigh the costs set up on the books of the utility, which are required to be kept in accordance with the Uniform Classification. This report, in an earlier paragraph, has vouched for the books and accounts of the respondent. This test of reproduction cost estimates is not to be confused with "book costs" and "investment" at some date remote from date of the inquiry. It is a comparison of theoretical estimates, made June 30, 1926, and brought down to December 31, 1926, with the written record of costs during the period between those dates, kept in accordance with the law of the state. P.U.R.1928B.

The evidential value of that record is superior to the most conscientious forecast.

It may also be pointed out that in the estimate of reproduction cost of pipe lines and their construction, as well as the rest of the plant, a liberal estimate is made by the engineers for "direct overheads." Mr. Collins, for protestants, calculates "construction overheads" at 15 per cent, consisting of contractor's fee 10 per cent, workman's compensation 0.75 per cent, public liability 0.25 per cent, engineering 1.5 per cent, and contingencies 2.5 per cent. Mr. Lerch adds to the cost of pipe, including freight, 0.5 per cent for purchasing, 1 per cent for warehousing, and 2 per cent for omissions and contingencies. He calculates labor overheads at 10 per cent and 12 per cent, varying with size of pipe. These consist of direct supervision 2 per cent, field accounting 1 per cent, use and loss of tools 2 per cent, insurance 1 per cent, and omissions and contingencies 4 per cent, with an additional 1 per cent for supervision and a like additional amount for omissions and contingencies for construction of lines over 6 inches in diameter. These estimates may be kept in mind for consideration in connection with the estimate of Ford, Bacon & Davis of \$471,758 for general overheads, together with \$284,235 for going value on account of the physical property alone.

Application of Various Unit Costs

The results achieved by the application of the various unit prices at reproduction cost which have just been referred to, may be shown by the following tabulations:

First, take Account 226, transmission line equipment. The largest item in that account is \$180,817.26 for 149,646 feet of 6 inch pipe, steel, screwed. Page 135 Ford, Bacon & Davis's report. That sum includes cost of labor and material, \$171,344.70, and \$9,472.56, direct overheads; but when it reaches the proposed rate base it has grown to be \$240,667.71 by the addition of estimates of general overheads and going value. The units making up that sum are shown in a tabulation, as follows:

Ford, Bacon & Davis's valuation. Account 226, transmission line equipment.

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Item: 149,646 feet 6-inch pipe, steel, screwed.

(Based on pipe at \$.7773 per foot f. o. b. Clarksburg; 3.8 cubic yards excavation per man-day; trench 16 inches x 30 inches; labor at \$4.12 per day; foremen, prices, and performance as set out in Lerch Exhibit No. 6, including direct overheads at 3.5 per cent on material and 10 per cent on construction costs.)

	Per foot.	Cost.	Overheads.	Total.
1. 149,646 ft. pipe and freight	\$0.7773	\$116,319.84		\$116,319.84
(1) Purchasing pipe .....	.0039		\$583.62	583.62
(2) Warehousing pipe ..	.0078		1,167.24	1,167.24
(3) Omissions and contingencies .....	.0155		2,319.51	2,319.51
2. Fittings, estimated per ft. of pipe .....	.0272	4,070.37		4,070.37
(4) Purchasing fittings ..	.0001		14.96	14.96
(5) Warehousing fittings ..	.0003		44.88	44.88
(6) Loss and waste .....	.0011		164.61	164.61
(7) Omissions and contingencies .....	.0005		74.82	74.82
3. Construction:				
(a) Clearing right of way ..	.0037	553.69		553.69
(b) Labor, ditching .....	.1548	23,165.22		23,165.22
(c) Foreman, ditching ..	.0131	1,960.36		1,960.36
(d) Backfilling ditch ....	.0268	4,010.51		4,010.51
(e) Unloading pipe .....	.0048	718.31		718.31
(f) Hauling and stringing ..	.0302	4,519.31		4,519.31
(g) Labor, laying pipe ..	.0967	14,470.77		14,470.77
(h) Foreman and car ....	.0104	1,556.32		1,556.32
(8) Supervision .....	.0068		1,017.59	1,017.59
(9) Field accounting .....	.0034		508.79	508.79
(10) Use and loss of tools ..	.0068		1,017.59	1,017.59
(11) Insurance .....	.0034		508.79	508.79
(12) Omissions and contingencies .....	.0137		2,050.16	2,050.16
Totals, FB & D p. 135	\$1.2083	\$171,344.70	(\$9,472.56)	\$180,817.26
(13) Engineering and supervision	5%		9,040.85	9,040.85
(14) Administration	2%		3,616.34	3,616.34
(15) Interest	6%		10,849.02	10,849.02
(16) Preconstruction costs ..	2%		3,616.34	3,616.34
(17) Legal expense	1%		1,808.17	1,808.17
(18) Insurance and taxes ..	1%		1,808.17	1,808.17
(19) Cost of financing	4%		7,232.68	7,232.68
Totals	21%	\$171,344.70	\$47,444.13	\$218,788.83
(20) Going value	10%		21,878.88	21,878.88
Grand Total		\$171,344.70	\$69,323.01	\$240,667.71
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The protestants' engineer estimated the same item at actual cost of pipe purchased by the company in 1926, at the labor performance sustained by the proof, at trench depth of 26 inches, and the unit costs of labor and construction overheads adopted by him. His calculations result in a finding of cost of reproduction of \$136,224.77 for labor and material, and \$20,441.65 for direct overheads, total \$156,666.42. To that sum he adds general overheads and going value to swell the estimate to \$192,699.64. An analysis of his calculation is as follows:

Collins's valuation. Account 226, transmission line equipment.

Item: 149,646 feet 6-inch pipe, steel, screwed.

(Based on pipe at \$0.6558, adjusted as to discount, per foot f. o. b. Clarksburg; 6 cubic yards excavation per man-day; trench 16 inches x 26 inches; labor at \$3.60 per day; foreman, prices and performance as set out in Collins's Exhibit Valuation, including valves and boxes, and construction overheads at 15 per cent.)

	Per foot.	Cost.	Overheads.	Total.
1. 149,646 ft. pipe and freight	\$0.6558	\$98,137.85		\$98,137.85
2. Fittings, estimated	.0229	3,426.90		3,426.90
3. Construction:				
(a) Clearing right of way	.0018	269.36		269.36
(b) Labor, ditching	.0665	9,951.46		9,951.46
(c) Foreman, ditching	.0048	718.30		718.30
(d) Backfilling ditch	.0200	2,992.92		2,992.92
(e) Unloading pipe	.0042	628.51		628.51
(f) Hauling and stringing	.0271	4,057.41		4,057.41
(g) Labor, laying	.0775	11,597.57		11,597.57
(h) Foreman, laying	.0041	613.55		613.55
Total, pipe installed	\$.8847	\$132,393.83		\$132,393.83
4. Valves and boxes	.0256	3,830.94		3,830.94
Total, including valves, etc.	\$.9103	\$136,224.77		\$136,224.77
5. Construction overheads:				
(1) Contractor's fee, 10%	.0910		\$13,617.79	13,617.79
(2) Workman's insurance 1%	.0091		1,361.78	1,361.78
(3) Engineering 1.5%	.0137		2,050.15	2,050.15
(4) Contingencies 2.5%	.0228		3,411.93	3,411.93
Totals, Plate 5, adjusted	\$1.0469		\$20,441.65	\$156,666.42

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6. General overheads:			
(5) Administration 0.5% .	783.33		
(6) Interest, 6.0%	9,399.96		
(7) Preconstruction costs			
0.5%	783.33		
(8) Legal expenses 1.0% ..	1,566.66		
(9) Insurance and taxes			
1.0%	1,566.66		
(10) Financing 4.0%	6,266.64		
Totals	\$40,808.23	\$177,033.00	
(11) Going value 10%	15,666.64	15,666.64	
Grand Total	\$136,224.77	\$56,474.87	\$192,699.64

Basing a calculation on pipe at \$0.6558, excavation per man-day of 6 cubic yards, trench at actual depth of 25.17 inches, and otherwise on labor and prices, performance, etc., adopted by Ford, Bacon & Davis, including direct overheads at 3.5 per cent on material and 10 per cent on construction costs, a reproduction cost of \$148,374 is achieved. This estimate includes labor and material at \$140,772, and direct overheads at \$7,602, of which the liberal sum of \$3,606.46 is for omissions and contingencies, as follows:

	Per foot.	Cost.	Overheads.	Total.
1. 149,646 ft. pipe and freight	\$0.6558	\$98,137.85		\$98,137.85
(1) Purchasing pipe .....	.0033		\$493.83	493.83
(2) Warehousing pipe ....	.0066		987.66	987.66
(3) Omissions and contingencies .....	.0131		1,960.36	1,960.36
2. Fittings, estimated per ft. of pipe .....	.0230	3,441.86		3,441.86
(4) Purchasing fittings ...	.0001		14.96	14.96
(5) Warehousing fittings ..	.0002		29.93	29.93
(6) Loss and waste .....	.0009		134.68	134.68
(7) Omissions and contingencies .....	.0005		74.82	74.82
3. Construction:				
(a) Clearing right of way	.0037	553.69		553.69
(b) Labor, ditching .....	.0823	12,315.86		12,315.86
(c) Foreman, ditching ..	.0070	1,047.52		1,047.52
(d) Backfilling ditch ....	.0268	4,010.51		4,010.51
(e) Unloading pipe .....	.0048	718.31		718.31
(f) Hauling and stringing	.0302	4,519.31		4,519.31
(g) Labor, laying pipe ..	.0967	14,470.77		14,470.77
(h) Foreman and car ...	.0104	1,556.32		1,556.32
(8) Supervision .....	.0052		778.16	778.16
(9) Field accounting .....	.0026		389.08	389.08
(10) Use and loss of tools ..	.0052		778.16	778.16
(11) Insurance .....	.0026		389.08	389.08
(12) Omissions and contingencies .....	.0105		1,571.28	1,571.28
Totals	\$0.9915	\$140,772.00	\$7,602.00	\$148,374.00

Note: If construction costs were calculated on excavation performance per man-day of 7.5 cubic yards, as testified is an average for deeper trenching than has been done by the respondent, a reproduction cost estimate of \$145,440.96 would be reached.

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The application to all pipe line accounts of the unit prices indicated in this report as having been proved, results in similar reductions from the estimates of Ford, Bacon & Davis. Calculations have been made, and they will be lodged with the papers in this case but will not be set out here.

However, in the distribution system certain trenches have been found to be of a greater depth than the dimensions used by the company's engineers. These items have also been recalculated, and a summary of the five items that make up the bulk of Account 234, distribution line equipment, is as follows:

	1	2	3	4
	F. B. & D. estimate with direct overheads.	Probable cost labor and material in place.	F. B. & D. direct over- heads on col. 2.	Cost plus direct overheads.
322,185 ft. 2 inch pipe	\$112,764.75	\$80,965.09	\$4,918.96	\$85,884.05
188,370 ft. 3 inch pipe	100,796.79	69,188.30	3,802.44	72,990.74
175,834 ft. 4 inch pipe	124,086.05	93,302.95	5,198.37	98,501.32
49,698 ft. 6 inch pipe	54,975.93	45,930.89	2,738.36	48,669.25
59,400 ft. 8 inch pipe	93,917.34	80,336.54	3,761.82	84,098.36
Totals	\$486,540.86	\$369,723.77	\$20,419.95	\$390,143.72

A study of the foregoing figures leads to the conclusion that the estimate of reproduction cost, new, of distribution lines, made by Ford, Bacon & Davis, exceeds a fair reproduction cost by at least 20 per cent, and that a like reduction should be made in that firm's estimate of reproduction cost of transmission lines and field line equipment and construction. A reduction of 5 per cent from the estimated cost of gas well equipment, consisting of tubing, casing, etc., is also justified by calculations similar to those already tabulated in this report. The reproduction cost, new, including direct overheads at the percentages adopted by Ford, Bacon & Davis, of the property just mentioned, as of December 31, 1926, may be stated as follows:

Account 212, gas well equipment	\$519,933.00
Account 213, field line construction	60,266.00
Account 214, field line equipment	137,163.00
Account 226, transmission line equipment	369,780.00
Account 234, distribution line equipment	434,625.00

Miscellaneous Property

The appraisal carries rights of way at a total of \$56,245, with the statement that "the cost of rights of way has been included P.U.R.1928B.

at the amount shown to have been paid therefor in the company's records." The statement continues, however: "In addition to this cost there is in allowance to cover the salaries and expenses of the employees securing rights of way." The unit prices per rod used by Ford, Bacon & Davis are as follows: for 2-inch line, 70 cents; 3-inch, 95 cents; 4-inch, \$1.45; 6-inch, \$2.20; 8-inch, \$2.70; 10-inch, \$2.70. The engineer for the protestants found no fault with these prices. In Lerch Exhibit No. 7 is given a statement of additions to Account 206, rights of way, production system, made between June 30, 1926, and December 31, 1926. The additions amount to \$541.50 at company book cost, and include 2-inch rights of way at 50 cents a rod, 4-inch at \$1 a rod, and 6-inch at \$1.50, also railroad crossing at \$50 and recording costs \$12. At the prices used by the engineers these rights of way would have cost \$691.35.

To reproduce the structures (buildings) of the company's system, a total of \$55,261 is estimated. Labor prices are used as follows: carpenters \$1 an hour, common labor 40 cents, bricklayers \$1.50, hod carriers 75 cents, stone masons \$1.50, glaziers 90 cents, painters 90 cents. Workman's insurance is estimated and labor overheads of 22 per cent are added. The report says: "The direct overheads included in these unit prices cover supervision, loss, and use of tools, liability insurance, incidentals and contingencies, purchases, warehouse handling and checking. To the direct overheads a total charge of 10 per cent was added for contractor's fee."

Meters and meter installations, and service lines are estimated at \$266,841, and these accounts also carry material overheads from 2.5 to 4.5 per cent and labor overheads of 6 per cent, including supervision, use and loss of tools, insurance, and omissions and contingencies. Compressing station equipment carries even larger percentages for direct overheads.

There is some difference in the opinion of witnesses on the market value of land. Col. R. B. Willison, the dean of Clarksburg realtors, expresses an opinion that the land in use is worth \$31,200, while Mr. Charles Little, an experienced real estate operator, fixes the value at \$27,250. The land will be included in the valuation at \$30,000.

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General Overheads

The engineer for the protestants has added to cost of labor and material and direct overheads \$461,646.78 for general overheads and going value, while Ford, Bacon & Davis fixes the total of these two items, on account of physical property alone, at \$753,418.24 as of June 30, 1926, and \$756,082 as of December 31, 1926. Ten per cent is added for going value and the percentages for general overheads are as follows:

	Production System.	Transmission System.	Distribution System.	General Property.
Engineering and superintendence	2.5%	5.0%	5.0%	1.0%
Administration	2.0%	2.0%	2.0%	2.0%
Interest	6.0%	6.0%	6.0%	6.0%
Preconstruction costs	2.0%	2.0%	2.0%	2.0%
Legal expenses	1.0%	1.0%	1.0%	1.0%
Insurance and taxes	1.0%	1.0%	1.0%	1.0%
Cost of financing	4.0%	4.0%	4.0%	4.0%
Total	18.5%	21.0%	21.0%	17.0%

Eighteen months is taken for the theoretical reproduction of the property and interest is calculated for half the period at 8 per cent per annum.

[10] The statement is made that "these overhead charges are unavoidable in the construction of a property of this nature and are as directly a part of its costs as are materials and construction labor."

Certainly some expenses are incurred in the actual building of a gas plant aside from the cost of labor, material, and the overheads, (1) purchasing materials, (2) warehousing, (3) omissions and contingencies, (6) loss and waste of fittings, (7) omissions and contingencies, (8) supervision, (9) field accounting, (10) use and loss of tools, (11) insurance and (12) omissions and contingencies, which have already been provided for in these estimates, as appears from the tabulations heretofore given. Reasonable sums should be estimated for these additional expenses in the theoretical rebuilding of the respondent's plant. The sums set out by Ford, Bacon & Davis are mere speculation, and they appear to be unreasonable in view of allowances already made.

It is one of the vices of the reproduction-new-less-depreciation P.U.R.1928B.

theory of valuation that gentlemen indulge their imaginations too freely in testifying to estimates of cost. This Commission has expressed a settled conviction on that point. In *Re Barboursville Water & Light Co.* 14 Ann. Rep. W. Va. P. S. C. —, it was said:

"If reproduction cost estimates are to be of value in rate making they must be shorn of many of their fanciful and unreal elements, including unreasonable costs for overheads, unusual estimates for labor and material and numerous other theoretical estimates that exceed the actual cost of constructing the plant, and are not in accord with modern commercial and industrial practices. The well managed modern utility invests its capital with rigid economy and at conservative costs. Why should not estimates of reproduction costs be made accordingly?"

Let the application of the proposed treatment of theoretical overhead costs be illustrated by reference to the last analysis of costs on another page, that of 149,646 feet of 6-inch pipe:

		Cost.	Overheads.	Total.
Pipe in place and direct overheads		\$140,772.00	\$7,602.00	\$148,374.00
(13) Engineering and supervision	5%		7,418.70	7,418.70
(14) Administration	2%		2,967.48	2,967.48
(15) Interest	6%		8,902.44	8,902.44
(16) Preconstruction costs	2%		2,967.48	2,967.48
(17) Legal expense	1%		1,483.74	1,483.74
(18) Insurance and taxes	1%		1,483.74	1,483.74
(19) Cost of financing	4%		5,934.96	5,934.96
Totals	21%	\$140,772.00	\$38,760.54	\$179,532.54
(20) Going value	10%		17,953.25	17,953.25
Grand Total		\$140,772.00	\$56,713.79	\$197,485.79

Men engaged in the public service natural gas business in West Virginia do not expend \$38,760.54 to install a pipe line costing \$140,772 for material and labor. Nor may an estimate of the value of such property be enhanced to \$197,485.79 without the most convincing proof.

[11-14] Interest at 6 per cent per annum for half the period of theoretical construction is a legitimate item of overhead costs, that is 4.5 per cent; cost of the nucleus of an administrative system of general offices, legal and legitimate commercial costs, and taxes and insurance during construction may be estimated P.U.R.1928B.

at 3 per cent. A total overhead cost of $7\frac{1}{2}$ per cent may be estimated on all the physical plant, in addition to the liberal direct overheads included in the adjusted appraisal, except on rights of way, it having been pointed out that the appraisal estimates are sufficient to account for any possible additional cost over the "first cost" of rights of way provided to be kept by the Uniform Classification of Accounts; and on field, transmission, and distribution lines 5 per cent will be estimated for engineering and engineering supervision. The direct overheads cover such costs as do other portions of the plant requiring engineering supervision.

Accrued Depreciation

The engineers testifying for the respondent and protestants have practically agreed on the percentages at which accrued depreciation, or "deterioration," is to be calculated on the cost new of a theoretically reconstructed plant.

Ford, Bacon & Davis arrived at the percentages to be applied to those parts of the plant that are susceptible of physical observation from an inspection of the property in place; except as to meters when "the percentage representing the observed deterioration existing was estimated from the records of the company as to meter replacement and maintenance." Five employees of the firm were sent to Clarksburg to verify the inventory and to take observations of the physical condition of the property, under the direction of Mr. H. W. Goebel whose testimony is recorded at page 765 of the transcript of evidence. Mr. W. G. Von Gemmingen contributed to the conclusions reported, by making numerous inspections of the pipe lines, the results of which were concurred in by Mr. Collins.

There being no conflict in the record as to the percentage of accrued depreciation existing in pipe lines, structures, and general equipment, the estimates in the reports will be used.

[15] It would be with great difficulty, however, that the calculation of accrued depreciation in gas well construction may be reconciled with that on gas well equipment, although the former account is not asked to be included in the rate base as heretofore. P.U.R.1928B.

fore explained. With reference to the cost of labor, hauling, and similar charges for drilling gas wells, the report says:

"It was taken as a reasonable assumption that the wells were in a condition of depletion indicated by the decline in rock pressure. Based upon the records of this decline it was found that the average rock pressure of a representative group of wells had declined 60.33 per cent from the original to the latest measurement. The 'gas well construction' account is, therefore, taken to be in a condition of 40 per cent of new cost."

This method was not adopted to ascertain the condition of tubing and casing in the same wells, which of course could not be examined by the engineers. The report continues:

"With reference to the account 'gas well equipment,' it was found from study of past operations that the company recovered approximately 90 per cent of the equipment in a well, the recovered material being in about 80 per cent condition. An amount representing this loss in use was deducted from the estimated cost of reproduction new in arriving at the deteriorated value of the account."

A condition of 72.43 per cent was thereupon adopted for gas well equipment. This conclusion is also irreconcilable with the contention of this respondent on a former application for change of rates when the Commission recited that "*it appears from the evidence* that the cost of plugging the wells will at least equal the salvage value of material used therein." Case No. 656, Clarksburg Light & Heat Co. 1 P. S. C. W. Va. Decisions, 604, 6 Ann. Rep. W. Va. P. S. C. 142.

It is evident the engineers have not taken into account the cost of salvaging the equipment and the cost of complying with the West Virginia law requiring abandoned wells to be securely plugged. Moreover, it is impossible to disassociate the cost of labor and the cost of material in determining the value of a structure. Upon its abandonment the cost of labor is entirely lost, of course; and the cost of material is also lost, except for its salvage value less the cost of salvaging it. No further evidence of salvage value of gas well equipment was adduced, and, it appears that a consistent and fair treatment of this account warrants the application of a percentage of depreciation equal to P.U.R.1928B.

that for gas well construction. And it is noted that on December 31, 1926, the average rock pressure had continued to decline until a per cent condition of 34.6 was fixed in Lerch Exhibit No. 7.

[16] The respondent's engineers advance the proposition that while the sums included in the reproduction cost of the property for interest during construction should be depreciated at the rate at which the direct cost of the property is depreciated, yet the sums theoretically expended for engineering should not so be depreciated, and sums for other overhead costs not at all. They calculate depreciation on the cost of engineering at the rate of one-half of 1 per cent in the production system, 2 per cent in the transmission system, 3 per cent in the distribution system and 1 per cent in the general property. The accrued depreciation in the property, the cost of which includes engineering expense, is much greater as may be seen from "Ford, Bacon & Davis's estimate of reproduction cost as of December 31, 1926," on another page of this report. No depreciation is admitted to exist in that part of the cost of the property designated overhead costs for administration, legal expenses and general commercial costs.

No sums should be included in the cost of construction of a plant for any expenditures not made in the ordinary course of such construction. If no engineering or administration is required, no estimate should be included for their cost. If such services are required, the cost thereof should be included, as the costs of freight and labor and material are included. As the property deteriorates its value is depreciated, and that value depends on the cost of labor and material, of freight and engineering supervision, and of any other service legitimately required in the construction of the property. When it is entirely worn out, its value is lost. Engineers and experts do not offer a market for second-hand plans. Their books are full of them.

The Commission will follow its usual practice and apply depreciation to the theoretical cost of the property, new, including those items for overheads which have been included in the estimates of such cost.

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Summary, Valuation of Physical Property

To summarize the adjustments made in the estimates of the engineers of the value of the respondent's physical property:

	Material, labor and direct overheads.	General overheads.	Total cost reproduc- tion new.	Present fair value.
<i>Production System:</i>				
204 Land	\$2,300	\$262.50	\$2,562.50	\$2,562.50
206 Rights of way ...	9,743		9,743.00	9,743.00
209 Measuring struc- tures	3,060	229.50	3,289.50	2,796.08
210 Other structures ..	365	27.38	392.38	362.28
212 Gas well equip- ment	519,933	39,994.98	559,927.98	193,735.08
213 Field line con- struction	60,266	7,533.25	67,799.25	55,595.39
214 Field line equip- ment	137,163	17,145.38	154,308.38	126,532.87
215 Measuring equip- ment	16,912	1,168.40	18,080.40	15,368.34
216 Drilling tools, etc.	49,951	3,746.32	53,697.32	42,957.86
Total, production system	\$799,693	\$70,107.71	\$869,800.71	\$449,653.40
<i>Transmission System:</i>				
218 Land	550	41.25	591.25	591.25
220 Rights of way ...	44,335		44,335.00	44,335.00
221 Compressing structures	11,256	844.20	12,100.20	10,481.19
224 Compressing equipment	32,132	2,409.90	34,541.90	29,484.97
226 Transmission line	360,780	46,097.50	406,877.50	349,914.65
Total, transmis- sion system ...	\$449,053	\$49,392.85	\$498,445.85	\$434,807.06
<i>Distribution System:</i>				
228 Land	\$8,450	\$633.75	\$9,083.75	\$9,083.75
230 Rights of way ..	2,169		2,169.00	2,169.00
231 Regulator struc- tures	12,092	906.90	12,998.90	10,802.87
233 Regulators	37,878	2,839.45	40,717.45	33,738.48
234 Distribution lines	434,625	54,328.13	488,953.13	400,941.57
235 Service lines	98,371	7,337.82	105,708.82	86,681.23
236 Meters	152,415	11,431.13	163,846.13	139,269.21
237 Meter installa- tions	16,055	1,204.13	17,259.13	14,670.26
Total, distribu- tion system ...	\$762,055	\$78,681.31	\$840,736.31	\$697,356.37
<i>General Property:</i>				
245 Land	18,700	1,402.50	20,102.50	20,102.50
Miscellaneous ac- counts	64,424	4,831.80	69,255.80	57,967.10
Total, general ...	\$83,124	\$6,234.30	\$89,358.30	\$78,069.60
Grand Totals ...	\$2,093,925	\$204,416.17	\$2,298,341.17	\$1,659,886.43

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Leaseholds and Natural Gas Rights

[17, 18] The respondent contends for a valuation of its leaseholds and natural gas rights as of June 30, 1926, at \$960,981; of which sum \$942,800 is the estimated value of operated leaseholds in 9,400 acres of land upon which it has acquired the right to drill for and produce natural gas, and \$18,181 is the estimated value of 18,180.40 acres of unoperated acreage under lease.

The supplemental report adjusting the valuation estimates to conditions existing December 31, 1926, gives the operated acreage at \$925,273, because of a decline in rock pressure since June, deducts from the \$18,181 for unoperated acreage \$1,597 for that number of acres abandoned, and adds \$1,146 for 848 acres added to the unoperated acreage account, making the estimated valuation as follows:

9,400 acres operated	\$925,273
17,432 acres unoperated	17,730
Total	<u>\$943,003</u>

In the brief on behalf of respondent its contention is stated as follows:

"All of the gas which the company has produced in the past and all of the gas which it is now producing has been and is the product of this 9,400 acres of operated territory; while the unoperated territory amounting in excess of 18,000 acres has been taken up and is being held with the hope and expectation that the same, or a considerable part of it, may hereafter prove to be productive gas territory. But the value of the applicant's leaseholds lies almost entirely in the 9,400 acres of operated territory which we have just mentioned. And the value of this last mentioned acreage we know constitutes a very large part of the present value of the applicant's plant and property. All this acreage is devoted to public use; all of it is highly productive; all of it has been thoroughly tested and proven, and unusually complete data and records exist of the performance of all of the several wells drilled thereon."

Mr. Boyd E. Hornor and Mr. Olandus West, both experienced operators of natural gas properties in the Clarksburg territory P.C.R.1928B.

and, therefore, interested in the price of gas, testified as to the "market value" of the gas leases, and Mr. Lerch testified as to the value of the estimated recoverable gas contained in the sands underlying the land on which the company has leases. The estimate of the quantity of recoverable gas, upon which Mr. Lerch's valuation depends, was made by Mr. Ralph E. Davis, an eminent expert in geology.

Numerous witnesses testified that the "market value" of gas at the well mouth in the Clarksburg territory is not less than 20 cents per thousand cubic feet. Mr. Lerch ascertained that it costs the respondent approximately 15 cents per M cubic feet to produce gas at the mouth of the well, using the production costs adopted by his firm. The difference between the "market value" and the cost, or 5 cents per M cubic feet, is taken as the value of a cubic foot of gas in the ground. Mr. Davis testified to a "sound" estimate of 18,505,454,000 cubic feet (adjusted to December 31, 1926); and that quantity of gas at 5 cents per M cubic feet amounts to \$925,273. The unoperated acreage, which is not now producing gas, was valued at \$1 an acre in the June valuation.

The valuation of natural gas rights and leaseholds has long been a bone of contention in gas rate cases in this state. It is involved in a case now pending in the United States Supreme Court.

This report will, therefore, content itself with following the course to which the Commission has consistently adhered, although not by unanimous opinion, and reject the theory upon which the engineers have arrived at an estimate of the value of the leaseholds, as well as the use of "market value" as a proper measure of the value of any utility property other than land and buildings, which by their very nature may be devoted to other uses and thereby have an earning capacity not influenced by state regulation. "Market value" depends upon net earnings. The Michigan Public Utilities Commission, in *Re Michigan State Teleph. Co.* P.U.R.1923A, 30, 62, has pointed out the absurdity of making rates on the market value of public utility property, as follows:

"The sale or exchange value of a plant depends largely upon P.U.R.1928B.

what it will earn. What it will earn depends upon its rates. If value depends upon rates, and if rates are to depend upon value, the whole scheme of rate making is absurd."

"The sale or exchange value of public utility property, where rates are subject to regulation and are regulated, cannot reasonably be made the basis of rates."

Dr. Wilcox, in his revision of Whitten's "Valuation of Public Service Corporations," at page 380 concludes a discussion of this subject by saying:

"It seems clear that neither the market value of stock and bonds, nor the market value of the physical property, nor the market value of the plant as a going concern, can be deemed of much importance in a rate case, for the reason that the market value is in large part dependent upon the rates. Yet, with respect to land, and in a lesser degree with respect to buildings and some other items of property market value is or may be used as the determining factor; but this only because such items of property are separable from the rest of the utility plant without destruction of value, so that their value is not dependent upon the rates charged, or even upon the continued operation of the plant as a whole. The fact that value in economics and practical business means exchange or market value and the further fact that the same tribunals often are charged with the duty of valuing utility property for both rate-making purposes and public acquisition have tended to foster confusion in the minds of courts and Commissions concerning the nature of fair value for rate-making purposes. The idea that public service property is held in private ownership like other property, that 'fair value' is value, and that present value is a matter of current prices, seems to dominate the thought of the United States Supreme Court and of most of the lower Federal courts. This idea is no doubt responsible for the rejection of the prudent investment rule, and for the emphasis placed upon spot reproduction cost. Although the search for the market value of a utility seems futile and its use as a basis for rate making illogical and destructive of the regulatory power, the courts continue to look for it."

The West Virginia supreme court of appeals, however, has P.U.R.1928B.

experienced no confusion on this subject. In *Natural Gas Co. v. Public Service Commission*, 95 W. Va. 557, P.U.R.1924D, 346, 356, 121 S. E. 716, the court said:

"Generally speaking, evidence of value in a rate-making case cannot be based upon the rate of return or earnings of the utility; and whenever this appears, either directly or indirectly, such evidence is incompetent."

And, in the same opinion, the court disposes of the contention that the "market price" of gas is not influenced by the regulated rates of public service corporations furnishing gas for heat, light, and power purposes. The opinion continues:

"It is almost inconceivable that there could be an open market for these gas leaseholds, situated as they are, which would not be based upon the rates at which the utilities there are selling gas to the public."

In following the course indicated, of rejecting the respondent's testimony of any appreciated value of its natural gas rights now used in its public service business, over original cost, the Commission is guided by the following cases: *Charleston v. Public Service Commission*, 95 W. Va. 91, P.U.R.1924B, 601, 120 S. E. 398; *Natural Gas Co. v. Public Service Commission*, *supra*; the *United Fuel Gas Company* rate cases, the last Commission report having been made March 24, 1925, 12 Ann. Rep. W. Va. P. S. C. 43, P.U.R.1925B, 705, and in *Re Cumberland & Allegheny Gas Co.* decided October 26, 1927.

It may be added, however, that it appears inconsistent for the respondent voluntarily to eliminate its gas well construction account from the rate base in this case because the charges therein have all these years been included in operating expenses for which provision was made by way of rates, and, in the same case, insist upon an appreciation of 800 per cent in the valuation of its gas leaseholds when during the same period it has included in operating expenses, for which provision was made by way of rates, the sum of \$1,092,744.32 for lease rentals and gas well royalties on account of its gas leaseholds. There was included last year \$79,571.40 for that purpose, and the Commission is asked to include that sum in a forecast of future P.U.R.1928B.

operating charges. A considerable quantity of gas is also furnished free to land owners under the terms of their leases.

The book cost of leaseholds and natural gas rights, as reported by the statistician as of December 31, 1926, was \$109,256.96, and, according to the engineers for the gas company the leaseholds have been depleted to 34.6 per cent of their original value. In the absence of competent proof of appreciation of the original cost, as well as to adhere to the equities of the tacit compact whereby the public has paid over a million dollars in rates on account of the rentals and royalties of the respondent's gas rights, the leaseholds and natural gas rights now used and useful in the service of the public will be valued at \$109,256.96.

Going Value

The protestants' engineer has estimated the going value of the business of the respondent, over and above the reproduction cost of its plant, less observed deterioration, at 10 per cent of such depreciated plant value. He bases that estimate on the custom of courts and Commissions and the fact that in a community where natural gas has long been used as fuel it would be an inexpensive task to secure customers for the product.

Ford, Bacon & Davis assigns an amount equal to 10 per cent of the estimated cost of reproduction new of the physical property and leaseholds and natural gas rights as representing going concern value. Mr. H. W. Goebel, an engineer with the same firm under whose direction the percentage of observed depreciation was ascertained, testified (page 797 of transcript) to the effect that the depreciated values stated in the report of Ford, Bacon & Davis were based on the property "as a going concern." It can scarcely be said that the plant of the respondent could be valued as a public utility plant, or for any other purpose, upon the modest allowance for depreciation from costs new for which the respondent contends, except for the fact that it has customers attached and is a going concern.

[19] This Commission has not looked with favor upon the practice of estimating going value on a flat percentage basis without convincing proof of the presence of a value in excess of the fair value of the utility's property, and, of course, exclusive P.U.R.1928E.

of good will, franchise rights, and similar elements of value that are excluded from the rate base of public service corporations because of their monopolistic position in the community. Bluefield Teleph. Co. v. Public Service Commission, 102 W. Va. 296, P.U.R.1927B, 855, 135 S. E. 833 (See 13 Ann. Rep. W. Va. P. S. C. 92, P.U.R.1926D, 209), Re Bluefield Water Works & Improv. Co. 14 Ann. Rep. W. Va. P. S. C. c. t., P.U.R.1927B, 275, Barboursville Water & Light Co. 14 Ann. Rep. W. Va. P. S. C. c. t.

[20] No sum has been proven in this case to be assigned as going value, but in that case the courts have indicated the Commission may fix such value from all the evidence before it, if possible to do so. Upon the whole record in this case \$125,000 will be included in the valuation on this account.

Working Capital

[21] The average monthly operating expenses of the respondent for 1926 were about \$70,000, which sum, together with \$40,000 for necessary supplies and working balance, appears to be a fair allowance for working capital. The respondent collects its bills daily on monthly billings of gas consumed. In a sense it does a cash business. The profits from its business are thereby collected monthly, also. These profits create a surplus for dividends, which until so paid out is available for working capital. Therefore, \$110,000 will be estimated for that item.

Present Fair Value

For the reasons set out in this report and others that appear from a study of the record, it appears that the fair value of the respondent's plant and business as of December 31, 1926, is \$2,000,000, and that sum is adopted as the rate base in this case.

The items upon which the foregoing valuation is based are as follows:

Physical property	\$1,659,886.43
Leaseholds and natural gas rights	109,256.96
Going value	125,000.00
Working capital	110,000.00
Total	\$2,004,143.39
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[22] This finding is slightly less than the rate base estimated by the engineer for the protesting city. However, a proceeding like this is not wholly a controversy between a public utility and those of its customers who appear in opposition to a proposed rate. Commission proceedings differ from court proceedings in that the state cannot be limited in its prerogative to regulate rates by the admission of any witness.

Amortization and Depreciation

[23] In October, 1916, this Commission prescribed rates for the respondent gas company to earn, among other operating charges, \$125,000 per year to take care of the depreciation and amortization of its investment. *Re Clarksburg Light & Heat Co.* 1 P. S. C. W. Va. Decisions, 191, 4 Ann. Rep. W. Va. P. S. C. 53, P.U.R.1917A, 577. It was then contended by the company that the future life of its business was between five and ten years. In other proceeding by amended petition and after further hearing, another order was made, April 15, 1919, 1 P. S. C. W. Va. Decisions, 604, 6 Ann. Rep. W. Va. P. S. C. 142, prescribing other rates to earn, among other operating charges, \$150,000 per year for the same purpose. This case was reviewed by the supreme court of appeals. *Clarksburg Light & Heat Co. v. Public Service Commission*, 84 W. Va. 638, P.U.R. 1920A, 639, 100 S. E. 551. The court's opinion was rendered October 7, 1919, and states that the petitioner there argued "that certainly in five or six years its gas supply will be exhausted, and its plant worthless, wherefore the Commission should have provided rates which would produce a revenue sufficient to amortize the plant within that time, as well as pay a return upon petitioner's investment." The court denied the petition for suspension of the Commission's order, and, with reference to the company's contention that its entire investment should be returned to it by the creation of a depreciation fund out of rate earnings sufficient to reimburse its stockholders during the five or six years supposed to be remaining of the usefulness of the plant, the court said:

"We must then assume that during all the time it has been operating, and withdrawing gas from its field, and selling the P.U.R.1928B.

same to its customers, it has been not only earning money, but it has been selling a part of its property, and we must depreciate its investment each year of its existence to the extent of such sales. . . . Instead of doing this, as we have before stated, the company during the first eleven years of its life only depreciated it to the extent of \$300,000 when in fairness the investment should have been depreciated down to the year 1914, when the Public Service Commission began to regulate it, to the extent of at least \$1,000,000." (*Supra*, at p. 652 of P.U.R. 1920A.)

In this present case the respondent takes the position that amortization of the physical property (excluding leaseholds and natural gas rights) should be "based on the estimated cost of reproduction new less observed deterioration less the value of salvageable property," but that no amortization should be "computed on distribution system property, as it is assumed that this property may be adapted to the service of mixed or manufactured gas." (Lerch Exhibit 9.) It is estimated that 10 per cent of all material will be salvaged, except tubing and casing in gas well equipment; and that equipment is considered 50 per cent salvageable. Mr. Lerch takes the percentage of material not salvageable (90 per cent except as above stated), adds labor costs, deducts observed deterioration from the sum, and assigns to the production and transmission systems their proportion of general property, going concern value and working capital, and thus arrives at the amortizable value of the physical property aside from the distribution system. In Exhibit 9 he describes the method of calculating amortization of the leasehold and gas rights valuation claimed by the respondent, as follows: "The amount of annual amortization of leaseholds and natural gas rights has been arrived at by multiplying the company's production for the 12-month period ended December 31, 1926, by the unit of value of 5 cents per M cubic feet as determined in the valuation report." An annual charge for amortization of physical property is sought, amounting to \$129,511, of which sum \$32,528 is for the production system, \$35,933 for the transmission system, and \$61,050 for "gas lands, leaseholds and natural P.U.R.1928B.

gas rights." An item for extraordinary maintenance of \$31,538 is also set up.

The Commission is unable to agree with this treatment of the subject of amortization. The supreme court of appeals has held, as cited herein, that it was the duty of this utility to amortize at least \$1,000,000 of its investment during the prosperous years from its organization in 1904 to the date of the beginning of state regulation, 1914. The report of the statistician shows that since the order in 1916, and beginning with 1917, the company, under the rates then prescribed, and afterward approved by the court, for the purpose and such changes as have been made by agreement with its customers), has earned sufficient revenue to pay itself the annual amortization and depreciation charge provided for by the Commission's order, with the exception of the years 1921 and 1926. The additional sum of \$1,300,000 has been included in the earnings from rates for the specific purpose, as set out in the orders, of providing for the amortization of the respondent's plant and property, including the distribution system.

According to the report of the statistician, page 30, the total undepreciated investment of the respondent is \$2,727,364.63, of which amount \$595,951.21 is in the distribution system which is not now asked to be amortized. Ford, Bacon & Davis estimated that 28.25 per cent of the general property should be assigned to the distribution system. That percentage of the investment of \$134,826.53 in general property is \$38,088.49 thus making an investment of \$634,039.20 that is not to be amortized, and leaving an undepreciated amortizable investment of \$2,093,324.93. As already pointed out, at least \$2,300,000 has already been provided for that purpose, while the additional adjusted sum of \$686,366.14 has also been paid the company by way of operating expenses included in rates for construction charges for the drilling of wells.

Additions will necessarily be made to the capital account of the respondent from year to year, although all maintenance and repairs are properly chargeable to operating expenses. The property is being maintained in good condition. This is to the advantage of the public.

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[24] Since 1916 this respondent has, by approval of the Commission, charged to operating expense the cost of drilling gas wells. This practice was based on the then belief that the entire property would become obsolete within a few years because of the exhaustion of the gas, which prophecy has proved false. The Uniform Classification of Accounts effective since January 1, 1923, requires such costs to be charged to capital. There appears to be no good reason why the respondent may longer be excepted from that requirement, and it should in the future charge to gas well construction account all proper expenditures for labor and expenses in drilling new wells as provided in the classification.

[25] Operating charges should be sufficient to take care of the depreciation and provide for the retirement of the additions to capital that are necessarily made from year to year, including gas well construction costs. The evidence indicates that the Harrison County gas field will produce that fuel for twenty or twenty-five years, perhaps not in great abundance but in such quantities that the production and transmission systems of the respondent will be in use, as well as its distribution plant.

For depreciation and amortization an estimate of \$40,000 per year will be included in operating charges.

Operating Expenses and Revenues

The operating expenses of the respondent for 1926 are given in the statistician's report, as hereinbefore stated, at \$837,915.56. That sum, however, includes \$9,528.35 rate case expense incurred in 1926, which will not be a continuing expense, and \$6,319.95, drilling costs, which will also be eliminated from future operating costs. The probable annual operating expenses upon which rates may now be based, therefore, are \$822,067.26. In Mr. Lerch's Exhibit 9, Rate Statements, December 31, 1926, in which is stated a comprehensive study of rates upon the valuation and amortization theories advanced by Ford, Bacon & Davis, the operating expenses for 1926, and on which the proposed rate is calculated, is taken from the books of the company at \$856,820. (Statement No. 2.) In that amount is included \$45,729.64, the sum of the entire drilling costs in 1926 and the rate case expense; and there are not included certain adjustments made by the statistician. P.U.R.1928B.

tician in order to reflect the true expense of the company. These adjustments aggregate \$10,976.90, and are set out on page 44 of the statistician's report. A calculation of the deductions and additions applied to Mr. Lerch's base of \$856,820 results in a finding of \$822,067.26 for operating expenses.

The operating expenses for 1926 include \$159,843.25 for 456,695 M. cubic feet of gas purchased from an affiliated utility, the Hope Natural Gas Company, at 35 cents per M cubic feet, and \$278,620.11 for gas purchased from other producers at varying prices. This Commission took the position in this company's rate case No. 415 (1916) (1 P. S. C. W. Va. Decisions, 191, 4 Ann. Rep. W. Va. P. S. C. 53, P.U.R.1917A, 577) that it has "the right to inquire into the reasonableness of the rate charged by the Hope Gas Company for the gas it sold to the applicant." That proposition has been restated in the case of Re West Union Gas Co. 9 Ann. Rep. W. Va. P. S. C. 193, 1 P. S. C. W. Va. Decisions, 937, P.U.R.1922A, 657, and in the case of Re Point Pleasant Nat. Gas Co. (1927) 14 Ann. Rep. W. Va. P. S. C. e. t., P.U.R.1927B, 803. The said rate is not now approved upon the record before the Commission. However, at the most favorable rate at which gas may be purchased by the respondent for resale, the quantities that will probably be required to supplement its declining production warrant the forecast of an operating expense of \$822,067.26 a year.

[26] The company's total expense before the Commission in this case is \$16,000, and that sum is a legitimate charge against operating expenses, but it should be amortized over a period of five years, making the annual charge \$3,200. This amount, together with \$40,000 for depreciation and amortization, may be added to \$822,067.26, operating expenses, to ascertain the probable annual charges for the immediate future, making those charges \$865,267.26.

The gross revenue of the company in 1926, which was the poorest year since 1921, was \$955,866.85. The increase in revenue from the proposed rate of 50 cents per thousand for gas for domestic consumption has been estimated at \$306,747.26, and the application of that rate would yield a gross revenue P.U.R.1928B.

nue of \$1,262,614.11. Deducting \$865,267.26 for operating costs, including taxes and an allowance for depreciation, there would remain \$397,346.85, as annual compensation for the use of property of the fair value of \$2,000,000, at a rate of return of 19.87 per cent. This rate of return is not deemed reasonable, and the rate of 50 cents per thousand cubic feet for gas for domestic consumption stated in the tariff under investigation will be held to be unjust and unreasonable as defined by the law.

The present rates of the company will earn over and above operating charges as set out above \$90,599.59 for return, 4.53 per cent. A rate of return as low as 6 per cent has been condemned by the United States Supreme Court, and the present rates of the respondent, therefore, are not sufficient to enable it to earn "a fair return on the fair value of its property now used and useful in the public service," to which it is entitled, as has been agreed by all the parties to this proceeding.

Reasonable Rates

The business of the respondent suffered a serious slump in 1926. Its income was \$61,439.20 less than in 1925, due largely to a decrease in consumption of gas for manufacturing purposes, while its operating expenses increased about the same amount over 1925, a larger quantity of gas having been purchased from nonaffiliated producers. A comparison of earnings is as follows:

	1925.		1926.	
	M. cu. ft.	Income.	M. cu. ft.	Income.
Domestic sales	1,486,950	\$455,207.60	1,577,918	\$482,117.13
Public buildings	65,023	13,655.09	57,680	12,494.85
Total	1,551,973	\$468,862.69	1,635,598	\$494,611.98
Private industrial	5,310	2,124.08	12,295	4,918.12
Manufacturing	1,282,821	513,128.68	1,062,286	424,915.04
Sold to affiliated company	80,793	20,198.25	89,982	22,495.50
Total sales	2,920,897	\$1,004,313.70	2,800,161	\$946,940.64
Discounts forfeited		5,221.65		5,510.43
Miscellaneous		7,770.70		3,415.78
Total income		\$1,017,306.05		\$955,866.85

There was a healthy increase in domestic consumption indicating the community is holding its own or increasing in population. P.U.R. 1923B.

ulation. There is no evidence, however, to indicate the probable future consumption of gas for manufacturing and industrial use. Whether the depression in those lines is temporary or may be expected to pass away shortly, it is difficult to foretell. Therefore, the conditions are not the best upon which to base rates for the future.

[27] The present rate schedule is indefensible in the light of the record in this case. It includes an agreed rate of 40 cents for manufacturing purposes, a step-up rate of from 30 cents to 38 cents for domestic use, and a rate of 21 cents for use by public corporations. Mr. Lerch testified from his Exhibit 9 that it cost two and a half times as much per thousand cubic feet to distribute gas, after it is delivered at the city gates, to domestic consumers as it costs to serve manufacturers. The practice of granting lower rates for public utility service to municipal and other public corporations has been condemned generally as discriminatory.

There are 9681 domestic, commercial and public corporation consumers. A rate of 50 cents per M cubic feet for the first 2,000 cubic feet consumed per month will earn \$116,172 per year for 232,344 M cubic feet of gas. Based upon the 1926 consumption of 2,800,161 M cubic feet, there would remain 2,567,817 M cubic feet to be sold per year. At a rate of 35 cents per thousand, that quantity of gas will bring in \$898,735.95. Including forfeited discounts and miscellaneous earnings, the gross revenue of the respondent would be \$1,023,834.16 at those rates. The rate of 50 cents per thousand for the first 2,000 cubic feet used per month by householders, in store and offices, and by public corporations, compared with 35 cents for quantity consumption, should take care of the cost of distribution to these consumers.

[28] This revenue will net a return of 7.928 per cent upon the fair value of the property. Should any of the 9681 consumers fail to use 2,000 cubic feet of gas in any month, a minimum charge of 50 cents a month may be exacted. And, in that event, the revenue and return may be slightly lower than above estimated. However, the probable return is sufficient, although it is customary to estimate a return of 8 per cent for P.U.R.1928B.

natural gas utilities. Moreover, it is considered in this case that the manufacturing industries in Clarksburg are apparently suffering a depression in business, with consequent serious effect on business conditions generally in that city. A public service corporation is not exempt from these hazards. It enjoys no immunities from economic laws that are not guaranteed to any other owner of private property, that is to say that no man's private property may be taken by the public, or the use thereof so taken, unless the owner of such property is paid a compensation for such taking that is a reasonable compensation under all the circumstances of the case. On the other hand, should conditions improve and the industrial consumption rise to that of 1925, a return of more than 9 per cent will be earned.

Therefore, the following rates are held to be just and reasonable rates: 50 cents per thousand cubic feet for the first 2,000 cubic feet consumed per month by domestic, commercial and public corporation consumers; 35 cents per thousand for all other gas delivered by the respondent to its customers, whether domestic, commercial, public, industrial, manufacturing, or otherwise (including affiliated companies); a minimum charge of 50 cents a month; and the present rates for street lighting.

The author of this report is authorized to say that Mr. Commissioner Nethken concurs therein.

Mr. Commissioner Divine does not concur in this report, and both he and Mr. Nethken have leave to file such memorandum as they may desire as part of the record.

Divine, Commissioner, dissenting: I am unable to concur in the order and report of the majority of the Commission in this case. In my opinion, under the evidence, the lowest possible value which can be placed upon the property of the Clarksburg Light & Heat Company is \$3,336,557, which valuation would clearly require higher rates than those authorized.

The following statement gives the investment or book cost of the applicant's property, prepared by Mrs. Williamson, statistician for the Commission, the protestants' reproduction cost new less depreciation value, and the applicant's reproduction

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cost-new less depreciation value, to which I have added an amount for going concern value and working capital.

Property.	Williamson Book Cost.	Protestants' Reproduction Cost-New Less Depreciation.	Lerch Reproduction Cost-New Less Depreciation.
Production system	\$1,351,505.11	\$1,054,218.00	\$1,247,861.00
Transmission system	503,571.14	461,144.00	577,569.00
Distribution system	595,951.21	718,634.00	890,406.00
General property	134,826.53	75,483.00	86,429.00
Total property other than Leaseholds, Working Capital and Going Concern Value	\$2,309,853.99	\$2,311,479.00	\$2,802,265.00
Leaseholds	141,505.11	500,000.00	976,840.00
Working Capital, Material, Supplies	221,937.00	221,937.00	221,937.00
Going Concern Value	294,929.00	303,141.00	*400,104.00
	\$3,244,225.10	\$3,334,557.00	\$4,401,146.00

*This allowance is 10% of cost-new less depreciation, plus working capital.

The investment, or book cost of the property, does not include any allowance for going concern value or working capital, and to arrive at a value, using the investment as a basis, I have added for working capital \$221,937, which the witnesses for the protestants and applicant agree to. I have added for going concern value 10 per cent of the depreciated physical value and working capital. The witnesses for both parties seem to agree that this allowance was reasonable, but the applicant made the allowance on the cost-new without depreciation.

The gas company has charged labor cost for drilling wells to operating cost, but Mr. Williamson has adjusted this and charged these amounts to property and added the same amount to income, otherwise it would be impossible to arrive at the actual investment in the property or the actual operating cost. These adjustments are fully explained in Mr. Williamson's report.

In connection with valuation fixed by the protestants' witnesses, I have included as the value of leaseholds the amount of \$500,000, which was indicated by Mr. Collins as his value of the leaseholds. In the report filed by Mr. Collins, he gave the unoperated acreage a value of \$18,000, but did not attempt P.U.R.1928B.

to value the operated acreage. In his testimony (R. 1303) he stated:

"I, therefore, think in my opinion possibly an even \$500,000 would be a fair estimate of the amount of gas held in reserve by the Clarksburg Light & Heat Company and consider it only a guess on my part."

It seems to me the only satisfactory evidence on the value of the leaseholds is that given by the applicant's witnesses and in the statement of the value claimed by the applicant I have taken the value of \$976,840 fixed by Mr. Horner.

In connection with the valuation presented by the applicant, three witnesses testified as to the value of the leaseholds,—Mr. Horner fixed the value at \$976,840; Mr. West at \$950,000; and Mr. Lerch, basing his value on the value of the gas in the ground, fixed the value at \$1,044,038.

It will be noted the value of the property fixed by the protestants, is \$91,334 greater than the book cost plus working capital and going concern value, and \$1,065,587 less than the value claimed by the applicant. Of this difference, \$476,840 is due to the difference in the valuation of the leaseholds; the balance of the difference, amounting to \$588,747, is for the most part due to the differences in opinion as to the allowance for overheads and cost of labor and material.

In the matter of depreciation, the engineers are not far apart; in fact, as to the depreciation of all pipes, they are agreed.

I think the overheads set up by the engineers for the applicant are reasonable and I think some of the cost prices adopted by Mr. Collins, the engineer for the protestants, are too low, but it does not seem to be necessary to go into a detailed analysis of these matters as a valuation based on the investment or book cost plus allowance for working capital and going concern value, or based on the depreciated book cost, or based on the value fixed by the protestants' witnesses, justified a substantial increase in rates above that allowed by the majority.

It appears from Mr. Williamson's report (pages 32, 44, and 54) the applicant has charged to operating expense the amount of \$678,815.84 on account of well construction labor cost instead of charging the same to property.

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This Commission has uniformly held that labor cost in connection with well drilling should be charged to property. This is a property account and, except for unusual conditions, which do not now exist here, this expense should be charged to property.

It has also been contended that this well labor cost should be deducted from the value of the property in fixing a rate base as property to the extent of this expense was paid for by the consumers and the company should not be allowed to earn upon it. In my opinion, as a matter of law, this contention cannot be sustained. If the company earned enough to pay this expense at all, the amount so earned for that purpose should be credited to the depreciation and depletion reserve and given consideration only in connection with the determination of the proper allowance for depreciation and depletion, or the amortization of the investment. In other words, if the company earned enough to pay this labor cost in addition to all other expense, this amount should be considered as applied to the amortization of the investment. Any deduction from the value of the property on this account would be contrary to the rule laid down in *Public Utility Comrs. v. New York Teleph. Co.* 271 U. S. 23, 70 L. ed. 808, P.U.R.1926C, 740, 46 Sup. Ct. Rep. 363.

In the case of *Re Clarksburg Light & Heat Co.* No. 415, 1 P. S. C. W. Va. Decisions, 191, 211, 4 Ann. Rep. W. Va. P. S. C. 53, P.U.R.1917A, 577, in which the opinion was written by Chairman Morgan, it is clearly indicated the charge of well cost to operating expense was for the purpose of taking care of the retirement or amortization of the investment.

It must be borne in mind that where the well cost has been charged to operating expense it has not been included in the property account and the company in the past has not been allowed to earn on this property. The property belongs to the company and it has a right to earn on it.

It is contended by the protestants that the gas leaseholds should be valued at the amount actually invested in them and should not be valued at their present fair value, or market value. I cannot agree with this contention. There is no question that where lands have been obtained, whether by purchase or lease, and are developed and proven to have a good supply of gas, they P.U.R.1928B.

have a value far in excess of the actual cost of obtaining such land for gas purposes. Anyone with a slight knowledge of the natural gas business knows there is a continual demand and search for gas territory, and when that territory is shown to have large gas deposits, it becomes very valuable property.

I am not able to understand why one class of a utility's property should be valued at its present fair value and the gas leaseholds valued on a different basis and given a value no greater than the actual investment in such property. *Bluefield Water Works & Improv. Co. v. Public Service Commission*, 262 U. S. 679, 67 L. ed. 1176, P.U.R.1923D, 11, 43 Sup. Ct. Rep. 675; *McCardle v. Indianapolis Water Co.* 272 U. S. 400, 71 L. ed. 154, P.U.R.1927A, 15, 47 Sup. Ct. Rep. 144; *Charleston v. Public Service Commission*, 95 W. Va. 91, P.U.R.1924B, 601, 120 S. E. 398; *Natural Gas Co. v. Public Service Commission*, 95 W. Va. 557, P.U.R.1924D, 346, 121 S. E. 716; *Elkins v. Public Service Commission*, 102 W. Va. 450, P.U.R. 1927B, 270, 135 S. E. 397; *Erie v. Public Service Commission*, 278 Pa. 512, P.U.R.1924D, 89, 123 Atl. 471; *People ex rel. Pennsylvania Gas Co. v. Public Service Commission*, 211 App. Div. 253, P.U.R.1925C, 608, 207 N. Y. Supp. 599.

In the case of *Re Clarksburg Light & Heat Co. supra*, at p. 603 of P.U.R.1917A, Chairman Morgan stated, in regard to the valuing of leaseholds, as follows:

"It was argued by remonstrants that, owing to the character of the property, or lack of property, in said leaseholds, that they should not be given any value by the Commission.

"The Ohio Commission, in *Re Northeastern Oil & Gas Co.* P.U.R.1916D, 692, 693, recently refused to fix a value upon the company's gas leaseholds in the valuation of its property. In that case the Commission held:

'Natural gas producing wells were valued for rate making, in the absence of cost records, or the proportion of producing wells to dry holes, by finding the average cost of material and labor in drilling and equipping a well, applying such cost, after deducting in the case of dry wells two-thirds of the value of materials as being recoverable for future use, to the number of producing and dry wells in contiguous townships which define P.U.R.1928B.

a gas territory, dividing such product by the number of producing wells in the contiguous territory, and multiplying such result by the number of producing wells being valued, no depreciation being charged for depletion, since nothing is added in the estimated value beyond the actual cost for productivity, and without deducting from the wells being valued any value for the recoverable material, since that may be treated as supplies on hand.'

Our supreme court said, in *Wilson v. Youst*, 43 W. Va. 826, 28 S. E. 781, 39 L.R.A. 292, that:

"An oil lease investing the lessee with the right to remove all the oil in place in the premises, in consideration of his giving the lessors a certain per cent thereof, is, in legal effect, a sale of a portion of the land, and the proceeds represent the respective interests of the lessors in the premises.'

"And it has also decided that leaseholds of this character are subject to taxation. They are bought and sold in the market and, therefore, certainly have a value and we see no reason why it should not be taken into consideration in fixing the value of a utility's property for rate-making purposes, although that value may be vague and uncertain to a considerable extent."

Later the Commission held that only the investment cost should be allowed as the value of leaseholds.

It may be well to note the principal items of property on which Mr. Collins, the engineer for the protestants, and Mr. Lerch, the engineer for the applicant, differ. Under the heading "Production System," Mr. Collins finds a value, exclusive of all leaseholds, of \$1,054,228. Mr. Lerch finds a value of \$1,267,403. In this class of property there is a difference of \$213,177 between them. Of this amount \$148,961 is the allowance for overheads. In "field line equipment" Mr. Collins allows \$34,322 more than Mr. Lerch, but on "gas well construction" he allows \$16,268 less, and on "gas well equipment" he allows \$20,091 less. The difference on these two items is due largely to the difference in the estimate of cost-new of the property. On "field line equipment" Mr. Collins' value is \$34,322 greater than that of Mr. Lerch.

Under the heading "transmission system property" it will P.U.R.1928B.

be noted Mr. Collins finds a value of \$461,144 and Mr. Lerch finds a value of \$572,056, which is \$110,912 greater than Mr. Collins. Of this amount \$58,703 is due to the difference in overheads, and the balance, for the greater part, is due to a difference in the estimate of cost-new of "compression station equipment" and "transmission line equipment."

Under the heading "distribution system property" Mr. Collins fixes a value of \$718,634, and Mr. Lerch a value of \$883,564, a difference of \$164,930. Of this amount \$85,977 is due to difference in overheads. The balance, except a small difference in land, is due for the greater part to the difference in the estimate of the cost-new of "distribution line equipment," wherein the difference is approximately \$56,000.

Under the heading "general property" Mr. Collins finds a value of \$82,728 and Mr. Lerch a value of \$104,066, but of this amount there is deducted \$13,800 on account of unused land, which deduction would leave a value of \$90,266 and a difference between the engineers of \$7,538, due for the most part to the difference in overheads.

It will be noted Mr. Collins has allowed only 1.50 per cent for engineering, which he has included in his construction overheads and not in his "general overheads." Mr. Lerch, who filed the report on behalf of the company, puts engineering into general overheads and allows for engineering the following amounts:

Production system	2.5%
Transmission system	5%
Distribution system	5%
General property	1%

In my opinion, the allowance made by Mr. Collins for engineering is clearly too small. The usual allowance for engineering in construction work of this kind is considerably larger.

In the case of Re United Fuel Gas Co. decided by this Commission March 24, 1925, P.U.R.1925B, 705, the following amounts were allowed for overheads:

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	Produce- tion System.	Trans- mission System.	Distri- bution System.	General Property.
Engineering and superintendence	2½%	7%	3%	3%
Administration	2	2	2	2
Interest	8	8	8	8
Preconstruction costs	2½	2½	2½	2½
Legal expenses	1½	1½	1½	1½
Insurance and taxes	1	1	1	1
Cost of financing	4	4	4	4
Total	21½%	26%	22%	22%

In that case Mr. Hagenah, the engineer for the protestants, allowed an average overhead of 18 per cent except on value of leaseholds, but allowed nothing for cost of financing.

Taking construction overheads and general overheads, together, the engineers are not far apart, but in some cases one allows as construction overhead what the other includes as general overheads. As an example, Mr. Collins includes engineering and contingencies in construction overheads rather than in general overheads, where they are usually placed.

Revenue and Expenses

Mr. Williamson made a study of the revenue and expense accounts as shown by the company's books and after making adjustment indicated in his report, he finds for the year 1926 as follows (Williamson Report, pages 34 and 42):

Revenue	\$955,866.85
Expense	\$837,915.56

I have reached the conclusion that the operating expense for 1926, as adjusted by Mr. Williamson, is a normal operating expense and will continue as approximately the same amount for several years, and the same is true as to revenue if the rates now in effect prevail. The applicant contends for an operating expense of \$951,632.95 (see Lerch Exhibit No. 9, statement No. 7). This includes well cost and allowance for depreciation and depletion. Mr. Williamson's report, page 56, shows the gas consumption by domestic consumers of different classes. In 1926 there was an increase in consumption by domestic consumers of 90,968 M.C.F. over 1925, but industrial consumers used 220,533 M.C.F. less. I think domestic consump-

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tion will increase some each year, but I doubt if there will be an increase of consumption by industrial consumers.

Depreciation and Depletion

It is necessary for the Commission to determine what amount shall be added to operating cost to take care of depreciation and depletion. The expression "allowance for depreciation and depletion" used in connection with this case is often referred to as the "allowance to amortize or retire the actual investment in the property."

This Commission has always recognized that a natural gas company, by reason of the depletion of the gas supply, has a limited and comparatively short life (this being true at least as to any particular gas field) and, by reason of the limited life, there should be allowed an amount, in addition to return and operating expense, that will retire the investment at the end of the life of the operation.

The gas company's evidence and contention as to the amount to be allowed to it annually for depreciation and depletion will be found in Lerch Exhibits Nos. 9, 10, and 11. The final analysis in which is stated the specific amount it claims should be allowed to it will be found in Statement No. 13 of Lerch Exhibit No. 9. The total annual allowance claimed is \$129,511, the same to be charged as an operating expense.

It will be noted in this connection the gas company does not seek to be allowed to amortize the value of the distribution system. However, it claims the present fair value of the property as the amount to be amortized rather than the actual investment in such property.

This Commission has held that the amount to be amortized is the actual investment in the property, and the annual allowance for this purpose is to be spread, as nearly as possible, over the estimated life of the plant. Of course, at any time, in determining the total amount to be amortized, consideration must be given to the amounts which have accrued for this purpose, and then deduct this amount from the total investment.

In an effort to throw some light on this matter I have made an analysis in three different ways, which I have designated as

Plan No. 1, Plan No. 2, and Plan No. 3. It is necessary to consider the following statements in connection with the discussion of this matter: [Tables omitted.]

Plan No. 1

The general object of Plan No. 1 is to show, after allowing for a return on the fair value of the property and paying operating expense, how much of the earnings remain which can be applied to the amortizing or retiring of the investment.

Referring to the statement:

Column No. 1. This column gives the adjusted investment in the property for each year as shown by the Williamson Report, page 29, Column No. 4.

Column No. 2. In order to make the book cost reflect approximately what I consider the present fair value of the property, I have added 25 per cent of the investment as shown for the year 1919 to the investment for the years 1919 to 1926, inclusive.

Column No. 3. This column is the total of Columns No. 1 and No. 2..

Column No. 4. To the value shown in Column No. 3, I have added 10 per cent for working capital and going concern value.

Column No. 5. This is the total of Columns No. 3 and No. 4 and, in my opinion, reflects approximately the fair value of the property for each of the years given.

Column No. 6. This shows the amount of an 8 per cent return upon the value shown in Column No. 5.

Column No. 7. This column shows the adjusted net operating income as shown by the Williamson Report, page 42, Column No. 7.

Column No. 8. This column shows the amount earned in each year in excess of the 8 per cent return, or the amount of Column No. 7 minus Column No. 6.

It will be noted the amount earned in excess of the 8 per cent return amounted to \$2,377,138.53. However, during the life of the plant the retirements amounted to \$439,866.15, which amount, if deducted from the amount shown in the total of Column No. 8, would leave \$1,937,272.38. Now if we deduct P.U.R.1928B.

this amount from the amount of the total investment as shown for the year 1926, which is \$2,727,364.63, we would have \$990,092.25 as the amount of the investment still to be retired, or rather, the amount for which provision must be made to retire in the next fifteen years.

I have adopted fifteen years as the future life of the plant, as the evidence shows the gas wells are 60 per cent depleted, which would give the plant a future life of approximately fifteen years.

If we divide \$990,092.25 by 15 we will have \$66,006, which amount must be allowed annually to retire the existing investment. However, the property will be added to in the future and an allowance must also be made to retire this property, and to this amount I have added \$46,000. The explanation of adopting this amount will be fully set out in the discussion of Plan No. 3.

The total annual allowance under this plan would be \$112,006.

Plan No. 2

It was noted under Plan No. 1 that everything in excess of an 8 per cent return was considered as applied to the retirement of the investment. Under Plan No. 2, I have allowed an 8 per cent return and also 8 per cent for retirement of the investment. If anything was left over after this 16 per cent was deducted, I applied one-half the balance for return and the other half toward the retirement of the investment. It will be noted that for a few years there was a sufficient amount earned to give a full return of 8 per cent.

The results of the working out of this plan are shown in Columns No. 9 and No. 10 of the statement and it will be noted at the bottom of Column No. 8 that the total earned to be applied to the retirement of the investment would be \$1,925,346.61, but from this must be deducted the retirements amounting to \$439,866.15, which leaves a total of \$1,485,480.46 as the amount of the investment to be retired within fifteen years, or \$99,032 per year. To this must be added, for property to be added in the future, \$46,000, making a total of \$145,000, which P.U.R.1928B.

should be allowed annually as per this plan for the retirement of the investment.

Plan No. 3

Under the third plan the assumption is made that depreciation and amortization must be provided for before any amount may be used for return on investment, as it is proper the company should restore impaired capital, or, in other words, should protect the investors' property by setting aside from earnings an amount sufficient to return to the investor his investment when the life of the property has terminated. This is particularly true of a gas utility having a limited life, such as the Clarksburg Light & Heat Company. The record discloses (Williamson Report, page 53, Columns No. 2 and No. 4) that the company has needed for depreciation purposes the sum of \$434,977.48 during the twenty-three years of its existence. The record further informs us that it is estimated that 60 per cent of the gas field has been consumed. The book investment, as shown in Column No. 1 of the attached statement, is \$2,727,364.63, and 60 per cent of this amount, or \$1,636,418.78, should have been amortized on December 31, 1926, as well as an additional amount of \$434,977.48. Column No. 11 provides $1\frac{1}{2}$ per cent annually to take care of the \$434,977.48 and produces, during the twenty-three years, \$439,866.15. By accruing $5\frac{1}{2}$ per cent for amortization there would be accrued in twenty-three years \$1,612,841.61. The $1\frac{1}{2}$ per cent and $5\frac{1}{2}$ per cent or a total of 7 per cent, are percentages of Column No. 1, the book investment. These two items make a total of \$2,052,707.76, and it is believed this amount should be deducted from the net operating income, as shown in Column No. 7, in order that the investment in the company may be protected.

In accordance with the foregoing estimate of 60 per cent gas field exhaustion and \$434,977.48 depreciation reserve retirements, this leaves earnings available for dividends of \$3,255,043.22 throughout the twenty-three year period. It will be noticed in Column No. 15 that since the existence of the Public Service Commission the company has not earned an average of P.U.R.1928B.

15 per cent, said 15 per cent being the $1\frac{1}{2}$ per cent depreciation, $5\frac{1}{2}$ per cent for amortization, and 8 per cent for return.

On this basis the company will have to amortize over a 15-year period, or the 40 per cent period remaining, the sum of \$1,109,634.35 (\$3,162,342.11 minus \$2,052,707.76), or a yearly average of approximately \$74,000. It will be necessary to amortize and provide depreciation for improvements made from 1926 on. The average yearly additional investment in the company's property is approximately \$137,500, and during five years this would be approximately \$687,500, and this amount would consequently have to be amortized over a 15-year period, or, to amortize the average for the next five years, \$229,166 would have to be amortized, or approximately \$46,000 per year. Adding this amount to the above mentioned \$74,000 will make an annual depreciation and amortization allowance of \$120,000, which should prove sufficient to amortize the remaining present undepreciated investment and to also amortize over the next fifteen years all additions made during the next five years.

The gas company does not ask to be allowed to amortize its distribution system property as this property will at some time in the future be used in connection with the furnishing of artificial gas. The book cost of this property as given by Mr. Williamson is \$595,951.21, to which I have added \$35,000 for general property, making a total of \$630,951.21. To amortize this over a 15-year period would require \$42,063 a year. If we deduct this from the amounts required under the different plans, the annual requirement would be as follows:

Plan No. 1	\$69,943.00
Plan No. 2	102,937.00
Plan No. 3	77,935.00

For the purposes of this analysis I have adopted the amount of \$50,000, though I think the allowance should be greater.

Following are a number of statements showing the amount of additional revenue which is required by the company to give it a proper return and pay all operating expenses. The rate bases used are: book cost plus working capital and going concern value; the book cost depreciated plus working capital and P.U.R.1928B.

going concern value; the value fixed by protestants' witnesses, including \$500,000 for leaseholds; and the value fixed by the witnesses for the gas company except as to going concern value.

1.

Book cost of property plus working capital (\$221,937.00) and going concern value (\$294,929.00)	\$3,244,225.00
8% return on above amount	\$259,538.00
For depreciation and depletion	50,000.00
Operating expenses	837,915.00
Revenue needed for return and expenses	\$1,147,453.00
Revenue received in 1926	955,866.00
Additional revenue needed for return and expenses	\$191,587.00

2.

In this statement I have used for the rate base the book cost of the property, depreciated, to which I have added for working capital \$221,937, and going concern value \$205,046. For the purpose of arriving at the depreciated book cost I used the statement found on page 30 of Mr. Williamson's report, which gives in detail the adjusted book cost or investment, and have applied as nearly as possible to the different classes of property and deducted for depreciation the same per cent deducted by Mr. Collins from the cost-new prices.

The book cost of the gas well is \$1,095,890. According to the reports of Mr. Lerch and Mr. Collins, approximately three-fifths of the total well cost should be allocated to well construction and two-fifths to well equipment, so I have divided the book cost of wells on this basis and arrive at the following amounts:

Well construction	\$657,534.00
Well equipment	438,258.00

It appears from Mr. Collins' report, pages 2 and 3, that he depreciates the well construction cost 60 per cent. This well construction cost for the greater part is represented by the hole in the ground, and, as a matter of fact, has not depreciated at all, but the engineers seem to use a life basis of wells to determine the depreciation and have adopted 60 per cent. On well equipment the engineers have applied a depreciation of 27.55 per cent. Applying this depreciation to the book cost we will have the following amounts:

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Gas well construction	\$273,013.00
Gas well equipment	339,431.00
Total	<u>\$612,444.00</u>

Field Line Construction and Equipment

The book cost of this class of property is \$255,614.52. Mr. Collins fixes the value of this property at less than the book cost. I have adopted his valuation for this class of property, which is \$170,097.06.

Transmission System

The book cost of this class of property is \$503,571.14, and from this I have deducted 14 per cent for depreciation, which is the amount Mr. Collins deducts from transmission equipment, and arrive at the amount of \$433,071.

Distribution System

The book cost of the distribution system amounts to \$595,951.21. I have depreciated this amount 18 per cent, which is the amount Mr. Collins applies to distribution line construction and equipment, and arrive at the amount of \$488,680.

General Property

The book cost of this property amounts to \$134,826.53. Mr. Collins finds the reproduction cost-new less depreciation of this property to be \$82,728, which is considerably less than the book cost, so I have adopted that amount.

Summary.

Book cost of leaseholds	\$141,509.00
Well property	612,444.00
Field line property	170,097.00
Transmission system	433,071.00
Distribution system	488,680.00
General property	82,728.00
Total	<u>\$1,928,529.00</u>
Working capital	<u>221,937.00</u>
	<u>\$2,150,466.00</u>
Going concern value (10% of above)	215,046.00
Total	<u>\$2,365,512.00</u>
8% of above for return	189,240.00
Depreciation and depletion	50,000.00
Operating expense	837,915.00
Revenue needed for return and expense	<u>\$1,077,155.00</u>
Revenue received in 1926	955,866.00
Additional revenue needed to pay return and operating expenses P.U.R.1928B.	<u>\$121,289.00</u>

3.

The rate base used in this statement is the value of the property given by the protestants' witnesses, as presented in Mr. Collins' report, to which has been added \$500,000 for value of leaseholds, this amount being a rough estimate of the value made by Mr. Collins:

Protestants' reproduction cost value of property plus \$500,000 for leaseholds	\$3,334,557.00
8% return on above amount	\$266,765.00
Depreciation and depletion	50,000.00
Operating expenses	837,915.00
Revenue needed for return and expenses	\$1,154,680.00
Revenue received in 1926	955,866.00
Additional revenue needed for return and expenses	\$198,973.00

4.

The rate base used in this statement is the value of the property testified to by the gas company's witnesses except as to going concern value:

Value of property testified to by the gas company's witnesses	\$4,401,146.00
8% of above amount for return	\$352,092.00
Depreciation and depletion	50,000.00
Operating expense	837,915.00
Revenue needed for return and expenses	\$1,240,007.00
Revenue received in 1926	955,866.00
Additional revenue needed	\$284,141.00

The majority estimate that the revenue which will be received by the company under the rates authorized will amount to \$1,023,834.16. In my opinion this is clearly insufficient to provide for a return of 8 per cent and take care of all operating expenses.

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WISCONSIN RAILROAD COMMISSION.

RE MILWAUKEE ELECTRIC RAILWAY & LIGHT
COMPANY.

[SB-2297, R-3471.]

Consolidation, merger, and sale — Desirability of merger — Passenger transfer convenience — Street railways.

1. The merger of two street railway companies was approved where it was apparent that the uniting of the two systems with the resulting transfer privileges extending throughout the single fare area was for the great convenience of a large number of people, p. 348.

Rates — Street railways — Improper application in merger proceeding.

2. Adjustments in fares or charges for transfers will not be considered in an application for approval of a merger of two street railway systems for transfer convenience where the application does not refer to any change or modification in such fares or transfers; and such matters can be considered only upon proper application, p. 348.

Valuation — Ascertainment of value for purposes of merger — Street railways.

3. For the purpose of merging two street railway systems the Commission determined that the value of the assets to be acquired should be on the basis of the balance sheets of the respective companies as of September 30, 1927, subject to the liabilities and credit accounts shown therein, pursuant to a provision of the Wisconsin Statutes (§ 196.535), p. 349.

[November 30, 1927.]

APPLICATION of a street railway company for authority to merge with another similar utility and for authority to substitute the service of the former upon the system of the latter, thereby permitting the establishment of a new through cross town line in the Milwaukee Metropolitan area; merger approved subject to the acquisition of capital stock and compliance with statutory provisions.

By the **Commission**: On November 10, 1927, the Milwaukee Electric Railway & Light Company filed an application, pursuant to the provisions of § 196.535 of the Wisconsin Statutes, for the consent and approval of the Railroad Commission to a merger of Milwaukee Northern Railway Company with the applicant corporation and for authority, upon title to the prop. P.U.R.1928B.

erty of Milwaukee Northern Railway Company becoming vested by merger in the applicant corporation, to extend the service of the applicant's railway system over the lines so acquired in substitution for the service now being rendered by Milwaukee Northern Railway Company.

Public hearing upon the application was duly noticed and held at the office of the city attorney of Milwaukee, at the city hall in Milwaukee, Wisconsin, on November 23rd, at ten o'clock in the forenoon. The following appearances were entered:

James D. Shaw, attorney for applicant; Walter J. Mattison, Assistant City Attorney for the city of Milwaukee; Edgar L. Wood, Attorney for Chicago & Milwaukee Electric Railway Company.

From the testimony of William A. Jackson, Vice President of the applicant, submitted at the hearing, it appears that the applicant desires to merge Milwaukee Northern Railway Company only in the event that it may be permitted to operate its service over the line of Milwaukee Northern Railway Company within the city of Milwaukee, issuing transfers to, and accepting transfers from, all of the intersecting and connecting lines of the applicant so that the local service upon the line of Milwaukee Northern Railway Company will become a part of the unified service of the applicant furnishing transportation service throughout the single fare area. In this manner it is proposed that users of the local service of the Milwaukee Northern Railway Company will be entitled, by the transfer privilege, to carriage to and from any part of the single fare area. In addition the applicant proposes to make the service operated upon the line now owned by the Milwaukee Northern Railway Company part of a through crosstown line by routing the First avenue branch of the applicant's Vliet-Howell avenue line westerly from Third street in Milwaukee on State street to Sixth street, thence north over the line of the Milwaukee Northern Railway Company and returning by the same route.

The Milwaukee Northern Railway Company and the Chicago & Milwaukee Electric Railway Company, pursuant to the requirements of their respective franchises, issue transfers to their passengers good upon the line of the other. Exhibits submitted P. U. R. 1928B.

at the hearing show that this transfer privilege is used by about 10 per cent of the passengers of the respective lines.

The applicant stated at the hearing that it proposed to establish a motor bus line upon Capitol Drive as an auxiliary to its railway system carrying passengers at the rates of fare fixed for such railway system and issuing transfers to, and receiving transfers from, all of the intersecting railway lines, including that of Milwaukee Northern Railway Company.

It was claimed by the applicant upon the hearing that if the Milwaukee Northern Railway Company's line were to be continued as an independent system it could not continue to operate local service without an increase in rates of fare. Aldermen of the city representing districts served by Milwaukee Northern Railway Company and property owners appeared in favor of the unification of the local line of Milwaukee Northern Railway Company with the system of the applicant. All of them, however, requested that the exchange of transfers with Chicago & Milwaukee Electric Railway Company be continued, if possible.

In opposition to the proposed merger there appeared Mr. E. F. Pahl and other business men who have feared that the proposed merger would result in the abandonment of the line of Milwaukee Northern Railway Company and the operation of express and freight cars upon Third street. If satisfactorily assured that the merger would not result in any diversion of Milwaukee Northern Railway Company traffic onto Third street they declared themselves satisfied with the proposed merger. In reply the company stated they had no intention of running freight cars over Third street and would not do it if petition were granted.

Alderman Joseph F. Drezdzen and others opposed the merger for the reasons that the interchange of transfers with the Chicago & Milwaukee Electric Railway Company would be discontinued and the new proposed through service would displace existing through service over the applicant's Vliet-First avenue line. Notwithstanding the present headway of twelve minutes on the Milwaukee Northern Railway Company's system and the delay incident to transfer, these objectors were of P.U.R.1928B.

the opinion that the facilities to be afforded by the through cross town line with a much better headway offered by the applicant would not be so satisfactory as the transfer between the Milwaukee Northern Railway Company's system and that of Chicago & Milwaukee Electric Railway Company.

[1] It seems apparent that uniting Milwaukee Northern Railway to the applicant's system with the resulting transfer privileges extending throughout the single fare area will be a great convenience to a large number of people. Exhibits introduced at the hearing indicate that the number of persons using the existing transfer privilege constitute only about $\frac{1}{10}$ of 1 per cent of the number of riders on the system of the applicant and of Milwaukee Northern Railway Company, to whom the new transfer privileges would be available. Of course, not all or even the larger part of the patrons of the applicant's system would use the new transfer privilege, but, it seems reasonably certain that the number of persons benefited by such new privilege would be several times the number inconvenienced by the discontinuance of the existing transfer.

[2] It is claimed by the applicant that if merger be permitted and the interchange of transfers with the Chicago & Milwaukee Electric Railway Company continued, it will be necessary to make some adjustments in fares or charge for transfers, otherwise the cars of the Chicago & Milwaukee Electric Railway Company will be taxed by persons seeking a short initial carriage at the northern end of the company's line in order to use the Milwaukee Northern system and the various lines of the applicant at a 5-cent fare.

The application does not refer to any change in the present rate of fare on the Milwaukee Northern Railway nor does it mention any modification in the interchange of transfers between this company and the Chicago & Milwaukee Electric Railway.

These are matters that will be taken up and given consideration by the Commission upon receipt of a proper application from the company.

There is nothing contained in these suggestions, however, P.U.R.1928B.

which need interfere with the applicant's procedure under this application.

We find that the new cross-town line extending service of the Milwaukee Northern Railway over the First avenue line will result in improvement in the transportation system in Milwaukee.

[3] The application of the Milwaukee Electric Railway & Light Company requests, in substance, that the Commission give its consent and approval in writing, pursuant to the provisions of § 196.535 of the Wisconsin Statutes, to the proposed merger of Milwaukee Northern Railway Company into the petitioner. It is proposed to effect this merger on the basis of the balance sheets of the respective companies as of September 30, 1927, copies of which are attached to the application.

According to the application, the petitioner is the owner of all of the common stock of Milwaukee Northern Railway Company. Petitioner further states in the application that it will arrange to have Milwaukee Northern Railway Company take steps for the redemption of its preferred stock on January 1, 1928, at the call price of \$105 per share, plus accrued dividends, and that thereafter petitioner will be the owner of all of the capital stock of Milwaukee Northern Railway Company.

In support of the application, the petitioner submitted a detailed appraisal of the property of Milwaukee Northern Railway Company. The Commission, therefore, finds and determines, in the light of evidence now before it and of such study as it has been able to make of that evidence, that the value of the assets to be acquired, as of September 30, 1927, is as stated in the following form of balance sheet (Table I) subject to the liabilities and/or credit accounts shown therein.

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Table I.

<i>Assets:</i>	
Property and plant	\$4,069,030.16
Reserve, sinking and special funds	29,800.00
Cash	51,704.05
Notes and bills receivable	587.73
Accounts receivable	70,466.02
Materials and supplies	27,806.31
Intercompany accounts	16,590.49
Prepaid accounts	4,069.41
Suspense accounts	8,696.51
Mequon quarry	660.76
Bond discount	226,237.82
Total assets	\$4,505,649.20
<i>Liabilities:</i>	
Capital stock—common	\$1,600,000.00
Capital stock—preferred	600,000.00
Funded debt	1,737,000.00
Accounts payable	12,448.84
Intercompany accounts	191,804.94
Taxes accrued	30,816.73
Sundry accrued liabilities	1,173.76
Suspense accounts	2,000.00
Reserves	270,626.62
Surplus	59,778.37
Total liabilities	\$4,505,649.26

It is hereby *certified* that the Commission finds that the proposed consolidation is consistent with the public interest and, as provided in § 196.535 of the Wisconsin Statutes, the consent of the Railroad Commission of Wisconsin is hereby given.

When the petitioner notifies this Commission that it is the owner of all of the capital stock of Milwaukee Northern Railway Company, final order in this matter will be entered by the Commission permitting the merger as requested.

It is *ordered* that in the event that the applicant acquires the property of the Milwaukee Northern Railway Company by merger, there shall be inaugurated a new cross-town street railway service from the lines of the Milwaukee Northern Railway over the First avenue line.

It is *further ordered* that none of the service now performed over the tracks of the Milwaukee Northern Railway shall be transferred to any other line of the applicant except in conformity to the above order, unless after due investigation and public hearing the Commission shall order otherwise.

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ARKANSAS SUPREME COURT.

CITY OF EL DORADO et al.

v.

W. M. COATS et al.

[No. 293.]

(— Ark. —, 299 S. W. 355.)

Franchises — Presumption against grantee — Sovereign powers — Franchises.

1. Every grant from a sovereign power is to be construed strictly against the grantee, and in favor of the city or government, and the rights of the public are not to be presumed to be surrendered except in so far as the intention to surrender them appears in the charter, p. 356.

Franchises — Presumption against surrender of sovereign powers.

2. An abandonment of public rights ought not to be presumed in a case if the deliberate purpose of the state or council does appear where a corporation alleges that the state or a city council has surrendered its powers of improvement and public accommodation, p. 357.

Contracts — Capacity of governmental bodies.

3. The state or a city council in the exercise of its sovereignty may contract like an individual, and be bound accordingly, p. 358.

Franchises — Contractual status — Municipal ordinance.

4. A contract is created between a city and a party or corporation to whom a franchise has been given or rights granted by ordinance, p. 358.

Constitutional law — Validity of duplicate unexclusive franchises.

5. An ordinance granting a franchise to a public utility of the same rights as were granted to another utility by a previous ordinance is valid where the rights granted under the first ordinance were not exclusive, since no obligation of contract is impaired, p. 360.

Injunction — Operation of competitive franchise not restrained.

6. Equity courts will not interfere by injunction to restrain the operation of corporations claiming the right to exercise a competitive franchise granted under the legislative authority conferred by the council, where a previous grant had not been exclusive, p. 360.

Franchises — Statutory provisions — Exclusive franchises — Presumption.

7. A law (Crawford & Moses' Digest, § 7492) providing that a city council may or may not grant an exclusive franchise as in their judgment seems best does not make a franchise exclusive where it does not plainly show that the council so intended, p. 360.

(WOOD, SMITH, and KIRBY, JJ., dissent.)

[October 31, 1927.]

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INJUNCTION by receiver of a gas company to restrain a city and others from permitting the operation of a rival franchise; injunction granted and appeal from union chancery court; reversed and remanded, with directions to dissolve restraining order.

W. M. Coats, receiver, El Dorado Gas Company and Central States Gas & Electric Company, the appellees herein, brought suit in the Second division of the Union chancery court against the city of El Dorado and Public Utilities Corporation of Arkansas, the appellants. In the complaint it was alleged:

That the El Dorado Gas Company is a corporation, organized and doing business under the laws of the state of Arkansas, and that the Central States Gas & Electric Company is a corporation, organized and existing under the laws of the state of Delaware. That the El Dorado Gas Company is a subsidiary of the Central States Gas & Electric Company, a majority of its stock being owned by that company. That W. M. Coats had been duly appointed by the chancery court of Union county as the receiver of said companies, and had taken charge of all of their properties, and was operating same under orders of the court. That the court had authorized the receiver to institute this action.

That the Public Utilities Corporation of Arkansas is a corporation organized under the laws of the state of Delaware and with its principal place of business in the city of El Dorado, and that it had complied with the laws of this state, with reference to foreign corporations doing business here.

That the city of El Dorado, on the 21st day of March, 1921, passed Ordinance No. 237, and granted to J. W. Atkins, his successors and assigns, the right to erect, maintain, and operate a system of pipes, for the conveyance of natural gas, for heating, lighting, and furnishing power for manufacture and other purposes, for public and private use, in the said city of El Dorado, and granted to him and his successors and assigns the right to use the streets, alleys, and public grounds of said city for these purposes.

That Atkins, his successors and assigns, accepted the rights granted under the franchise, and complied with the terms and conditions of the same.

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That the Central States Gas & Electric Company are the owners, and entitled to the rights and privileges granted under the ordinance to Atkins, his successors and assigns, by proper deed of conveyance and assignment.

That Atkins, his successors and assigns, were granted for a period of twenty-five years, after the passage of the ordinance, the right to enter upon and excavate, dig, and do such things as might be necessary to lay its gas mains and gas pipes, with the necessary attachments, for the purpose of supplying gas to its consumers in said city. The rates to be charged consumers were set out in said ordinance, and it was further provided that the city was to receive 2 per cent of the gross receipts from the sale of gas in said city, same to be paid each month.

The city of El Dorado was to receive free gas, for the purpose of heating the city halls and city prison, and was also obligated to keep in reserve at least one well, of sufficient capacity to supply the city with gas, in case any of the other wells failed, and to give to the city of El Dorado preference of supplying gas, as against all its other consumers.

It was further alleged that the appellees had erected, and maintained at a large expense, a system of pipes for the purpose of supplying gas, under the terms of said ordinance and franchise; that it had furnished the city its gas free, as provided in said ordinance, and had paid 2 per cent of its gross receipts.

It was further alleged:

That on the 6th day of January, 1927, the city of El Dorado, through its mayor and council, for the purpose of supplementing and obtaining a competitive system of pipes for furnishing gas to domestic and industrial consumers in the city, passed an ordinance, granting to the Public Utilities Corporation of Arkansas, and to its successors and assigns, the right to erect, maintain, and operate a system of pipes for the conveyance of natural gas, for heating, lighting, and furnishing power for manufacturing and other purposes for public and private use in the city, and granting to it the right to use the streets, alleys, and public grounds in said city, for a period of twenty-five years, and that said ordinance was duly passed and later accepted by the said Utilities Corporation of Arkansas. The rates to be charged un-

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der the ordinance granting the franchise to the Utilities Corporation were set out in the ordinance.

That, by the passage of the Ordinance, granting to J. W. Atkins, his successors and assigns, the right to lay pipes and mains for the purpose of providing gas to its consumers, it entered into a contract with J. W. Atkins, his successors and assigns, and that the said franchise and privileges were exclusive, and conveyed to them exclusive rights and privileges, and that, by reason of the provisions in said ordinance, requiring the payment of 2 per cent of the gross receipts to be paid to the city, and having obligated Atkins and his assigns to furnish gas free to the city, for its hall and prison, without reserving to the city the right to enter into a similar contract with any one else, by clear implication, contracted and agreed with Atkins and his assigns to have the exclusive privilege of using the streets and alleys of said city, for the purpose named in the ordinance, and also by implication contracted and agreed with Atkins and his assigns not to enter into any other contract with any other person or corporation by which gas might be furnished to consumers in said city, thereby depriving Atkins and his assigns of full benefits to be derived under their ordinance and franchise.

That, the granting to Atkins and his assigns being exclusive, the city of El Dorado had no right or authority, under the law, to grant to the Public Utilities Corporation the privilege of using the streets and alleys of said city for the purposes of laying pipes and mains and to supply customers with gas, and that the rights granted under the last named ordinance are void, and that the Public Utilities Corporation would not be entitled to exercise any rights or privileges granted to it under and by virtue of said ordinance.

It was further contended:

That the Public Utilities Corporation had accepted the rights granted to it in the last named ordinance, and had already entered upon the streets, and commenced to dig and excavate, for the purpose of maintaining and operating a system of pipes for the conveyance of natural gas to be sold to consumers in said city, and that, if the Public Utilities Corporation were permitted to erect and maintain a system of pipes in the city, and were

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permitted to furnish domestic and industrial consumers, gas in said city, in competition with the Central States Gas & Electric Company, it would seriously impair the obligation assumed by the said company and its contract with the city under the franchise granted, which would result in great and irreparable injury to said company.

That the franchise granted to the Public Utilities Corporation and the contract thus made were all done for the purpose of destroying the Central States Gas & Electric Company's ability to perform the obligations imposed upon it by their contract with the city, and would prevent it from exercising and enjoying the rights and privileges granted to it under and by virtue of its franchise obtained from the said city.

There was a prayer for an injunction to restrain the Public Utilities Corporation, its agents, servants, and employees, from proceeding to lay its gas mains and gas pipes in the streets and alleys of said city, and from distributing natural gas, and supplying and selling the same to its customers in the said city, and that the franchise granted to it be canceled and set aside, and that, upon a final hearing, it be permanently enjoined from proceeding under said franchise.

We do not deem it necessary to set out anything further in regard to the ordinances which are the basis of this litigation, because the salient features of the same have already been stated, and a fuller statement would incumber this opinion.

A notice, petition, and bond for removal of the cause to the District Court of the United States, in and for the Western District of Arkansas, El Dorado Division, was filed, which was by the court overruled.

The Public Utilities Corporation filed a general demurrer to the complaint of the appellees, because the same did not state facts sufficient to constitute a cause of action.

The city of El Dorado filed a separate demurrer to the complaint, because:

No. 1. The suit was against the city of El Dorado to enjoin an alleged breach of a franchise, granted to Atkins and his assigns, and to enjoin the said city from carrying out a franchise granted by it to the Public Utilities Corporation of Arkansas, P.U.R.1928B.

and that, in granting either of said franchises, the said city of El Dorado was acting for, and on behalf of, the state of Arkansas, and that the suit in fact was against the state of Arkansas.

No. 2. That the complaint did not state facts sufficient to constitute a cause of action.

The court overruled both of said demurrers, and the city of El Dorado and Public Utilities Corporation of Arkansas elected to stand on its demurrer, saved exceptions to the ruling of the court, and prayed an appeal to this court, and the chancellor granted an injunction, which became effective on May 21, 1927.

Appearances: Jeff Davis, J. G. Ragsdale, and Powell, Smead & Knox, all of El Dorado, and Pace & Davis and Robinson, House & Moses, all of Little Rock, for appellants; Mahony, Yocum & Saye and Marsh, McKay & Marlin, all of El Dorado, and G. E. Garner, of Little Rock, for appellees.

Ponder, Special Judge (after stating the facts as above): The appellees W. M. Coats, receiver, El Dorado Gas Company, and Central States Gas & Electric Company claim that it has the exclusive right of supplying the city of El Dorado and its inhabitants gas for domestic and commercial purposes; that this exclusive right and privilege is given and granted to it by virtue of a certain ordinance, passed by the city council on March 21, 1921, under which J. W. Atkins, his successors and assigns, were given this franchise and that Atkins organized the El Dorado Gas Company, and transferred to it this franchise; that, although the word "exclusive" does not appear in the ordinance, still, by reasons of certain provisions in the ordinance by which the city was to receive 2 per cent of the gross revenues from the business each month, and was to keep one well in reserve for the benefit of the city and its consumers, by implication it was intended, and did operate, to make an exclusive franchise, under the law; that the first ordinance granting a franchise to Atkins and his successors made a contract between him and the city; and that the same cannot be impaired or broken by the passage of the ordinance on the 6th day of January, 1927, and that this last ordinance and franchise are void.

[1] By its complaint filed in equity, the plaintiffs asked that P.U.R.1928B.

the defendant corporation may be perpetually enjoined from building its gas and pipe lines in the city of El Dorado and furnishing gas to the inhabitants of said city, and from enjoying the rights and benefits given it by reason of the franchise granted, notwithstanding such right had been granted by the council of said city, under the powers given to it by the legislature of this state. Both plaintiff and the defendant corporations derive their franchises and authority from the council acting in its sovereign capacity. In this country, as in England, every grant from the sovereign power is to be construed strictly against the grantee, and in favor of the city or government. The rights of the public are, therefore, not to be presumed to have been surrendered to a corporation, except so far as the intention to surrender them appears in the charter. *Inland Fisheries Comrs. v. Holyoke Water Power Co.* 104 Mass. 446, 450, 6 Am. Rep. 247; *Newton v. Mahoning County*, 100 U. S. 548, 25 L. ed. 710; *Bradley v. South Carolina Phosphate & P. R. Min. Co.* 1 Hughes, 72, Fed. Cas. No. 1,787.

The plaintiff claims there was a contract between it and the city of El Dorado, which secured to it the exclusive right to furnish gas to said city. The court says in *Tucker v. Ferguson*, 22 Wall. (89 U. S.) 527, 575, 22 L. ed. 805:

"But the contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt, should be resolved against it. Where it exists, it is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require."

[2] A state or council ought never to be presumed to surrender this power, because the whole community have an interest in preserving it undiminished; and, when a corporation alleges that the state or council have surrendered its power of improvement and public accommodation, abandonment ought not to be presumed in a case in which the deliberate purpose of the state or council do not appear. *Charles River Bridge v. Warren Bridge*, 11 Pet. (36 U. S.) 420, 9 L. ed. 773; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 666, 24 L. ed. 1036; *Union Bridge Co. v. Spaulding*, 63 N. H. 298.

The contention of the appellees is that the franchise granted
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by the ordinance in March, 1921, to Atkins and his assigns, together with what was done under the same, constituted a contract, which is binding on the council and the city, and that the subsequent franchise granted to the appellant company impairs the obligation of this contract.

[3] Unquestionably the state or the council, in the exercise of its sovereignty, may contract like an individual, and be bound accordingly.

[4] This court is committed to the doctrine that, where rights are granted by ordinance, and a franchise given, it creates and makes a contract between the city and the party or corporation to whom it is granted. *Mena v. Tomlinson Bros.* 118 Ark. 166, 175 S. W. 1187; *Arkansas Light & P. Co. v. Cooley*, 138 Ark. 390, 211 S. W. 664; *Pocahontas v. Central Power & Light Co.* 152 Ark. 276, P.U.R.1922E, 137, 239 S. W. 1, 244 S. W. 712; *El Dorado v. Citizens' Light & P. Co.* 158 Ark. 550, 250 S. W. 882; *Natural Gas & Fuel Corp. v. Norphlet Gas & Water Co. (Ark.)* 294 S. W. 52.

These decisions and others of this court have created fixed property rights in this state, and it is not the purpose of this decision to modify or overrule these cases and the rules of law therein announced. But they all distinguish themselves from the case at bar, for they were not exclusive contracts, or exclusive franchises, and herein lies the line of demarcation. This distinguishes contracts of a private nature from public contracts, and the rule of interpretation is different.

In the case of *Little Rock R. & Electric Co. v. Dowell*, 101 Ark. 223, 142 S. W. 165, Ann. Cas. 1913D, 1086, 1087, Chief Justice McCulloch said:

"A city council acts in a legislative capacity in exercising the powers conferred upon it to grant franchises for the public benefit. The power thus conferred upon a city council by the lawmakers is co-equal with the power in this respect, of the legislature itself, and in the exercise of this power a discretion is vested which cannot be taken away by the courts. . . . To proceed upon any other theory would be to substitute the judgment and discretion of the courts for the judgment of the . . . P.U.R.1928B.

[city] council with whom the lawmakers have seen fit to lodge this power."

In the case of *El Dorado v. Citizens' Light & P. Co. supra*, at p. 553, Chief Justice McCulloch, again speaking for the court, said:

"The council of the city of El Dorado passed an ordinance . . . granting a franchise to . . . Rowland and . . . other citizens . . . to construct and operate a system for furnishing light and water in the city, and the franchise was subsequently assigned . . . to the Citizens' Light & Power Company. . . . Prior to the time a franchise, for similar purposes, *not exclusive*, had been granted to the Arkansas Light & Power Company, and that company is operating in the city."

The italicized words "*not exclusive*" clearly show that it was not an exclusive contract. The ordinance granting the franchise alone making the contract, the question, therefore, to be determined in cases of this kind, when the legislative interference is claimed, is whether such interference impairs the obligation of the contract, for there may be legislation such as to injuriously affect the interest of those with whom such contracts exist, and yet impair no obligation of contracts. Thus it has been held that, when a state confers no exclusive privileges to one company, it impairs no contract by granting a franchise to a second one, with powers and privileges which necessarily produce injurious effects and consequences to the first. *Washington & B. Turnpike Co. v. Maryland*, 3 Wall. (70 U. S.) 210, 18 L. ed. 180.

The misfortunes which follow in such cases, as the court aptly remarks in that case, "may excite our sympathies, but are not the subject of legal redress."

Such was the doctrine laid down in *Charles River Bridge v. Warren Bridge*, 11 Pet. (36 U. S.) 420, 527, 9 L. ed. 773, and which from that day to this has been sustained by the courts of last resort in this country. *Tuckahoe Canal Co. v. Tuckahoe & James River R. Co.* 11 Leigh (Va.) 42, 36 Am. Dec. 374; *Lehigh Water Co. v. Easton*, 121 U. S. 388, 391, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916.

In considering the question whether the council has trans-
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scended its power by the ordinance granting the appellant company the right and privileges contained in the franchise, it becomes necessary to construe the legislative act of the council and the ordinance under which the appellees assert their claim of an exclusive right.

[5, 6] For notwithstanding the ordinance granting to appellees the franchise became a contract, founded upon mutual considerations, yet if no exclusive right was conferred, then the second ordinance, which granted the franchise of the same rights to the appellant company, is valid, because no obligation of contract was impaired. Nor will equity interfere by injunction to restrain the operation of a person or a corporation, claiming the right to exercise a similar franchise under the legislative authority conferred by the council. High on Injunctions, § 902.

Under the rule of law herein announced the appellees did not have an exclusive contract or franchise. This doctrine is vital to the public welfare.

[7] Mr. Justice Clifford, in *Holyoke Water-Power Co. v. Lyman*, 15 Wall. (82 U. S.) 500, 511 (21 L. ed. 133) remarks that:

"Repeated decisions of this court have established the rule, that whenever privileges are granted to a corporation, and the grant comes under revision in the courts, such privileges are to be strictly construed against the corporation and in favor of the public, and that nothing passes, but what is granted in clear and explicit terms. Whatever is not unequivocally granted in such [ordinance] is taken to have been withheld."

The same rule is followed in 12 R. C. L. pp. 186-198.

The only other question to be determined is the construction to be given to § 7492 of C. & M. Digest.

We are of the opinion that, under the language of this section, the council may have granted to the appellees an exclusive franchise or not, as in their judgment seemed best. Not having granted such a franchise, there is nothing in this section that makes it exclusive.

For the reasons given, this cause is reversed and remanded, with directions to dismiss the complaint of the appellees, be-P.C.R.1928B.

cause the same does not state a cause of action, and for want of equity, and that the restraining order granted herein shall be dissolved.

Judge McHaney, being disqualified, did not participate in the proceeding.

Wood, Smith, and Kirby, JJ., dissent.

Rehearing denied, November 28, 1927.

CALIFORNIA SUPREME COURT.

POSTAL TELEGRAPH-CABLE COMPANY

v.

PACIFIC GAS & ELECTRIC COMPANY.

[S. F. 11203.]

(— Cal. —, 260 Pac. 1101.)

Electricity — Power interference with telegraph transmission as not a nuisance.

1. Interference with the transmission of telegraph messages caused by induction of electrical forces from a nearby high voltage power line is not a nuisance within the Civil Code (§ 3479), p. 363.

Electricity — Power line interference with telegraph transmission.

2. The principle which subjects to a high liability the owner who uses his property for unnatural purposes will not operate to give rise to a claim by a telegraph company for damages caused by interference to the transmission of messages caused by the induction of electrical forces from high voltage power lines in view of the unnatural use of property indulged in by the telegraph company itself, p. 363.

Electricity — General allegation of negligence in power transmission.

3. An allegation by a telegraph company that power lines were negligently constructed and maintained at different localities in the state was too general and hence demurrable in an action for damages resulting from interference with transmission of messages caused by the induction of current from such high voltage line, p. 366.

(SHENK, J., and WASTE, C. J., dissent in part.)

[October 31, 1927.]

En banc. APPEAL from superior court from judgment dismissing action by telegraph company against power utility for P.U.R.1928B.

damages resulting from electrical interference; judgment affirmed.

Appearances: Willard P. Smith, of San Francisco, for appellant; Thomas J. Straub, L. H. Susman and Charles E. Finney, all of San Francisco, for respondent.

Langdon, J.: Plaintiff appeals from a judgment against it after a demurrer to the complaint had been sustained and plaintiff had declined to amend. The complaint, after alleging the corporate capacity of the parties and the nature of their respective businesses, as disclosed by their corporate names, sets out, in the first count, that one of the power lines of the defendant extends from the city of Sacramento to the city of Suisun, a distance of about 40 miles, over which the defendant transports normally an alternating electric current of high potentiality of about 53,000 volts, and that said line parallels the portion of said plaintiff's telegraph line for the entire distance between said cities, "being at no point more than 210 feet from the line of plaintiff, and for a distance of about eight consecutive miles between said cities not more than twenty-one feet from plaintiff's line, and for a distance of 5 consecutive miles between said cities not more than twenty-five feet from plaintiff's line; and that the portion of said lines of defendant between said cities was constructed many years after the construction of plaintiff's said line."

It is then alleged:

That by reason of the said high voltage of defendant's line, "there extends, in all directions about it, a field of force for more than two hundred and ten feet, and said field of force carries within such field many electric currents of high and varying intensity which are not controlled by or confined to said power lines and due to said proximity and parallelism of plaintiff's and defendant's said lines between said cities of Sacramento and Suisun, and the fact that said field of force extends in every direction about its said power lines and carries within such field many currents of high and varying intensity which are not controlled by or confined to said power lines, a portion of the electric current transported by defendant on said lines

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is at all times inducted on to plaintiff's said lines, thereby interfering with the transmission of telegraphic messages thereover and greatly decreasing the quickness and accuracy with which telegraphic messages can be transmitted over plaintiff's said line as compared with what would be the case if such induction did not exist. That said inductive interference has been increasing within the past three years and particularly interferes with the use of machine transmission of messages, and at times completely prevents the operation of said machines. That there have been within the past three years interruptions and breaks in the said lines of the defendant, causing at such times the current passing through defendant's said line to surge and rise in voltage, and said high voltage to be inducted on to plaintiff's said line between said cities whereby the said portions of plaintiff's said telegraph line and equipment thereof in this state have been burned out, destroyed, and damaged, and on many occasions it has been impossible, for several hours at a time, to transmit telegraphic messages over said line, and the physical damage to plaintiff's said line and the equipment thereof, from such surges and induction, within three years last past has amounted to the sum of \$2,000."

[1, 2] Appellant contends that these allegations constitute the defendant's power lines a nuisance, within the meaning of § 3479, Civil Code. On the other hand, the respondent maintains that a distinction exists between cases where a plaintiff has been making an ordinary use of his property and is prevented from doing so by inductive interference, and cases where both plaintiff and defendant are making an extraordinary use of their property and inconvenience results to one in this extraordinary use of his property by reason of the use of the other. The case of *Eastern & S. A. Telegr. Co. v. Cape Town Tramways Cos.* (1902) A. C. 381, [71 L. J. P. C. N. S. 122, 50 Week. Rep. 657, 86 L. T. N. S. 457, 18 Times L. R. 523], 2 British Ruling Cases, 114, 126, contains the following language:

"A man cannot increase the liabilities of his neighbor by applying his own property to special uses, whether for business or pleasure. The principle of *Rylands v. Fletcher*, [L. R. 3 P. U. R. 1928B.

H. L. 330, 37 L. J. Exch. N. S. 161, 19 L. T. N. S. 220, 1 Eng. Rul. Cas. 235], which subjects to a high liability the owner who uses his property for purposes other than those which are natural, would become doubly penal if it implied a liability created and measured by the nonnatural uses of his neighbor's property."

In the instant case the use of each party is extraordinary, and each makes a similar use, though different in degree. The distinction between the rights of parties thus situated and the respective rights of parties where one is engaged in the ordinary development of his land and the other is subjecting his land to an extraordinary use is pointed out in the case of *Lake Shore & M. S. R. Co. v. Chicago, L. S. & S. B. R. Co.* 48 Ind. App. 584, 589, 92 N. E. 989, 991, 95 N. E. 596, where the court says:

"This controversy is between users of electricity; appellant using light currents, and comparatively delicate instruments, which are interrupted by escaping currents from the wires carrying exceedingly high voltage belonging to the appellee. It is not a question between one engaged in the ordinary development of his land and the customary and appropriate employment of it according to its inherent qualities and its surroundings, without bringing upon it artificially of any substance not naturally found there (*Evans v. Reading Chemical Fertilizing Co.* 160 Pa. 209, 28 Atl. 702; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 6 Atl. 453, 57 Am. Rep. 445), and one engaged in the unnatural and extraordinary use of his property, calling for the application of the maxim '*Sic utere tuo*,' etc., which is the governing principle in *Fletcher v. Rylands* [1 L. R. Exch. 263] *supra*, and *Rylands v. Fletcher*, L. R. 3 H. L. 330 [37 L. J. Exch. N. S. 161, 19 L. T. N. S. 220, 1 Eng. Rul. Cas. 235]. In this case the use of electricity is common to both parties, and both are acting under legislative grants. In such cases it seems to be the consensus of opinion, both in England and in this country, that where one is acting under legislative authority, and within the right thus given, and reasonably within the exercise thereof, using care and caution regarding the rights of his neighbor, any inconvenience or

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incidental damage which may arise in the absence of any negligence from the reasonable use of his own property will be regarded as within the rule *damnum absque injuria*."

In *Phillippay v. Pacific Power & Light Co.* 120 Wash. 581, 207 Pac. 957, 211 Pac. 872, 23 A.L.R. 1251, the telephone company brought action against the power company for the cost of metallicizing a telephone line to prevent inductive interference and for loss of profits occasioned by such interference. A judgment for plaintiff was reversed upon appeal. This case reviews, at some length, the conflicting authorities concerning the relative rights of telephone and telegraph companies and power companies and accepts the rule of nonliability for inductive interference, using the following language:

"The appellant contends that it, being rightfully on the highway by reason of a franchise properly granted, was under no duty of metallicizing or bearing the cost of metallicizing of the telephone line. The respondent contends that, since the power line interfered with the use of the telephones, that company should bear the expense of metallicizing. The controlling question, then, is whether the power company was under obligation to bear such cost. This question is one of first impression in this court. It should be remembered, in considering the question, that the telephone company did not own the land through which, with its single line system, the current returned to the point of origin. The weight of authority, so far as the question has been determined, is in favor of nonliability of the power company."

The case of *Yamhill County Mut. Teleph. Co. v. Yamhill Electric Co.* 111 Or. 57, 224 Pac. 1081, 33 A.L.R. 373, is in harmony with the view above quoted, as are the cases of *Postal Teleg.-Cable Co. v. Chicago, L. S. & S. B. R. Co.* 49 Ind. App. 697, 97 N. E. 20; *Citizens' Teleph. Co. v. Ft. Wayne & S. R. Co.* 53 Ind. App. 230, 100 N. E. 309, Ann. Cas. 1916A, 132. The rule is summarized in 20 C. J. 315, as follows:

"As has been said, however, the right of the first licensee is not exclusive. So long as it is not disturbed in its occupancy, it must submit to such unavoidable inconvenience as may result from a reasonable and fair exercise of the junior licensee's P.U.R.1928B.

franchise. Damages which are merely a natural incident to and the direct and immediate result of the junior licensee's operations are not actionable and such operations will not be enjoined. To give the prior licensee a right of action, the junior licensee must have been guilty of negligence, trespass, or malice."

The Federal court rule also seems in harmony with the cases hereinbefore cited, for in *Cumberland Teleph. & Teleg. Co. v. United Electric R. Co.* (C. C.) 42 Fed. 273, 284, 12 L.R.A. 544, it was said:

"We think the obligation is upon the telephone company to adopt it, and that defendants are not bound to indemnify it; in other words, that the damage incidentally done to the complainant is not such as is justly chargeable to the defendants. Unless we are to hold that the telephone company has a monopoly of the use of the earth, and of all the earth within the city of Nashville, for its feeble current, not only as against the defendants, but as against all forms of electrical energy which, in the progress of science and invention, may hereafter require its use, we do not see how this bill can be maintained."

[3] It seems unnecessary to multiply authorities to the same effect, and we shall pass to the second cause of action, which was based upon negligence. In considering the complaint, we must remember that the demurrer interposed thereto was both general and special, and when the order was made sustaining it the plaintiff was given leave to amend, but declined to do so.

After reiterating the pertinent allegations of the first cause of action, the statement of the second cause of action continues:

"That the portion of defendant's power lines between said cities of Sacramento and Suisun, and its power lines in various other portions of said state of California, all of which are connected up with said power lines between said cities of Sacramento and Suisun, are negligently constructed, and defendant has at all times negligently failed to keep the same in repair, and the same are negligently constructed, maintained, operated, and equipped; that old, weak, wooden poles, with single-pin insulators are used, and that many of said poles have rotted and
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broken off near the bottom, and have not been replaced by other poles, and have been imperfectly stubbed, and that said portions are too weak to properly support the wires strung on the same, and that said wires are negligently placed so that the wires of plaintiff are within the field of force of said 53,000 volt current.

"That by reason of the premises, there have been breaks in the defendant's lines, causing the current passing through defendant's said lines to surge and immediately rise in voltage above the said 53,000 volts, and to be inducted on to the plaintiff's said line between said cities, whereby the same and *other portions of plaintiff's said line and equipment in this state* have been burned out, destroyed, and damaged; and that the physical damage to plaintiff's said lines and equipment thereof from such surges and induction has been \$2,000."

It needs no citation of authority to support a ruling against such general allegations. Defendant is not required to meet, without notice, evidence regarding lines of plaintiff and defendant all over the state of California. Neither the time, the place, nor the nature of the negligence relied upon are fixed by plaintiff's pleading, and the special demurrer thereto was properly sustained.

In the exercise of its regulatory power, the Railroad Commission has already made an order, affirmed by this court, for the relocation of appellant's line, the cost thereof to be borne equally by appellant and respondent herein. *Postal Telegraph-Cable Co. v. Railroad Commission*, 197 Cal. 426, P.U.R.1926B, 22, 241 Pac. 81. There is involved in this appeal, therefore, no question of a continuation of the difficulties and damage for which compensation is sought, and under the rule of the authorities herein cited, defendant is not liable for the damage caused under the circumstances set forth in the complaint.

The judgment appealed from is affirmed.

We concur: Richards, J.; Seawell, J.; Curtis, J.

Shenk, J.: I concur in the foregoing opinion in so far as it holds that the special demurrer to the second cause of action was properly sustained, but I dissent from that portion of the P.U.R.1928B.

opinion which holds that the first count fails to state a cause of action. The first count in my opinion clearly alleges a continuing nuisance in that the defendant so installed and maintained its transmission lines that its high voltage currents were inducted onto and interfered with the operation of the plaintiff's telegraph lines, causing substantial damage thereto. It is alleged that the induction interferes with the use of machine transmission of telegraph messages and at times completely prevents the operation of said machines.

Included in the definition of a nuisance is the obstruction to the free use of property. Section 3479, Civ. Code; 20 Cal. Jur. 261. Section 731 of the Code of Civil Procedure specifically provides for an action for damages for the maintenance of a nuisance, and the complaint shows that the alleged inductive interference is the direct and immediate result of the defendant's use of its property. The question of the superior right of a subsequent licensee in a public street or highway by reason of the paramount right of the public in the service performed by the subsequent licensee is not involved in this case. Here the two corporations, each exercising rights under a public grant of franchise for the purpose, are maintaining parallel lines on private rights of way in such manner that the defendant, the junior licensee, is so exercising the right as substantially to destroy the use to which plaintiff, a prior licensee, is reasonably putting its property. It is true that each is exercising what is called an extraordinary use, but I fail to comprehend the distinction endeavored to be made between the mutual rights and obligations of those putting their property to such extraordinary use. The rule announced by the main opinion is too broadly stated. It must be conceded that wanton or negligent damage is actionable without regard to priority. And it may be assumed that the prior licensee may not complain of unavoidable inconvenience as a result of the junior licensee's operations. But when the interference by the junior licensee is avoidable and substantial damage ensues, a right of action should lie. As I read the numerous authorities cited in the briefs, this proposition cannot be successfully controverted. Reason and justice demand that it must be so. It is incon-

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ceivable that a junior licensee, merely because it has the right from the public to exercise the franchise and maintain its high tension power lines, may so exercise that right as to exclude the prior licensee from the exercise of its lawful rights when such interference may reasonably be avoided. The prior licensee has the right to carry on its operations without substantial impairment. Deiser on Law of Conflicting Uses of Electricity and Electrolysis pp. 54-57, and cases cited. That the damage claimed by the plaintiff herein is substantial is shown by the allegations of the complaint. That it is avoidable is evidenced by the order of the Railroad Commission in directing a separation of the lines sufficient to obviate the damage. Postal Telegraph-Cable Co. v. Railroad Commission, *supra*. The exercise of the police power is not here involved, and in no sense may the damage alleged be reduced to *damnum absque injuria*.

I concur: Waste, C. J.

MICHIGAN SUPREME COURT.

HENRY W. TEN BROEK et al.

v.

SWAN A. MILLER et al.

[No. 47.]

(— Mich. — 216 N. W. 385.)

Service — Duty to render — Summer resort company — Discrimination.

1. A summer resort company engaging in serving the public with water and light is rendering public service and has a duty to serve all patrons alike without discrimination even though it is only a semi-public utility corporation, p. 371.

Service — Discontinuance of service for collateral dispute.

2. A summer resort company engaged in serving its cottages with light and water may not discontinue service because of the failure of a consumer to install a septic tank when ordered to do so, whether or not the company had any rule or regulation to that effect, p. 371.

Service — Damages arising from improper discontinuance.

3. A judgment for damages resulting from the unlawful discontinuance by a utility of light and water measured by a failure of con-

sumer to rent his cottages as a result of such discontinuance was held to be proper, p. 373.

[December 1, 1927.]

SUIT by the owner of three cottages against summer resort company supplying light and water for damages for failure to render service; decree for the plaintiff affirmed on appeal.

Argued before the entire court.

Appearances: Diekema, Kollen & Ten Cate, of Holland, for appellants; Linsey, Shivel & Phelps, of Grand Rapids, for appellees.

Bird, J.: Plaintiff is the owner of three lots on Macatawa Park, in Allegan county. They are improved with two cottages. Macatawa Park is a summer resort, with numerous cottages. The cottages are furnished water and electric light by defendant, Macatawa Resort Company, was incorporated for the purpose, among other things, of furnishing water and electric light to the resorters. There is no village or city control on the beach, and everything relating to health, order, and the peace of the community is governed by regulations and laws of the resort company.

The company had furnished plaintiff water and electric light for several years for his cottages. On July 16, 1923, the company severed the connections of the water and light, and refused to furnish him water and light thereafter, although he was willing to pay for it, unless he subscribed to the following conditions:

"Macatawa Park, Michigan, April 9, 1924.

"Ten Broek Conditions.

"Build such septic tank as approved of by the board of health.

"Pay for the value of wood taken, \$25.

"Sign contract to abide by our laws and rules and regulations.

"Pay the attorney's fee, \$35.

"When the above is complied with, he will be recognized as a cottager."

Plaintiff refused to comply with the conditions, and in the spring of 1924 he restored the connections, and filed this bill P.U.R.1928B.

and obtained a temporary injunction inhibiting defendants from again severing them.

Defendants contend that the connections were severed because plaintiff was ordered to build a septic tank to care for his sewage, and instead of doing so he constructed a cesspool. Defendants further claim that plaintiff cut two trees on resort property, and would not comply with the rules and regulations of the resort company.

Plaintiff denies that he refused to comply with the rules and regulations of the resort company, and denies that he cut two trees on resort property, but admits that he cut two dead trees on his own property which were leaning toward his cottages, and because they were a menace to his cottages.

Plaintiff further shows that he did not receive the notice to construct a septic tank until after he had completed a new cesspool, and he denies that the state health officer ordered the installation of septic tanks, but charges that he simply suggested it. He also denies that he violated any rules of the resort company by installing a cesspool, as § 23 of its by-laws recognized that cesspools may be installed. That by-law provides:

"No cesspool shall be placed within four feet of any cottage or within the cottage or outbuilding connected therewith."

And he shows by his proofs that many other cottagers, naming them, maintained cesspools to care for their sewage, and at the same time were receiving water and light.

One soon discovers while reading the record that there was much bad blood between Mr. Swan A. Miller, the president and general manager of the resort company, and the plaintiff. Without discussing their grievances, it perhaps will be sufficient to say that the unfriendly feeling which existed between them undoubtedly influenced, in some measure, the company when it deprived plaintiff of his water and light.

The real question for us to determine is whether the resort company was entitled to cut off and deprive plaintiff of his water and light for the reasons specified in its notice heretofore referred to.

[1, 2] The resort company was engaged in serving the public with water and light. This was a public service, and it was P.U.R.1928B.

its duty to serve all patrons alike, and not to discriminate against any one of them, and this rule would apply, even though defendant were only a semipublic utility corporation. *Wolff Packing Co. v. Industrial Court*, 262 U. S. 522, 67 L. ed. 1103, P.U.R.1923D, 746, 43 Sup. Ct. Rep. 630, 27 A.L.R. 1280. It had a right to provide reasonable rules and regulations in the conduct of its business, of furnishing water and electric light, and, unless these rules and regulations were complied with, it would have a right to decline service. It was, however, the duty of the resort company to furnish water and light under reasonable rules and regulations. There is no claim that plaintiff refused to pay the rate charged for water and light, nor is there any claim that he did not pay in accordance with the rules, but defendants now say the service was cut off because plaintiff would not install a septic tank when ordered to do so. The plaintiff denies that the resort company had any rule or regulation that septic tanks should be installed, and no such rule is shown in the evidence. But, even if it did have such a rule, and it was not complied with by plaintiff, that would furnish no adequate reason for refusing to furnish him water and light.

20 C. J. 333, in discussing this question, says:

"Payment of proper charges for service supplied is a reasonable condition of the right to receive it, and for nonpayment of such charges the service may be discontinued, but service cannot be cut off to enforce payment of a disputed claim, or a claim for service rendered at some other place, or of a collateral liability not connected with the particular service."

The installing of a septic tank was purely a collateral matter, and had no relation to the duty of defendant company to furnish the light and water, and receive its pay therefor. See also, *Phelan v. Boon Gas Co.* 147 Iowa, 626, 125 N. W. 208, 31 L.R.A.(N.S.) 319. If plaintiff were violating a rule of the state health department, he could be proceeded against for its infraction in the proper forum. This would be a more orderly way of disposing of the dispute than for defendant to substitute itself for a court and punish plaintiff by shutting off his water and light.

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[3] The chancellor awarded plaintiff the sum of \$1,000 for his damages. The deprivation of the light and water prevented his renting his cottages. We think the award was within the proofs, and should not be disturbed. The decree of the lower court was right, and should be affirmed, with costs of both courts.

Sharpe, C. J., and Fellows, Wiest, Clark, and McDonald, JJ., concur.

Steere, J., and the late Justice Snow took no part in this decision.

NORTH CAROLINA SUPREME COURT.

AILEEN MILLS, INCORPORATED

v.

NORFOLK-SOUTHERN RAILROAD COMPANY.

[No. 492.]

(— N. C. —, 140 S. E. 306.)

Service — Railroads — Expense of spur track — Maintenance.

1. In the absence of a contract by which a railroad company is obligated to maintain a side track and trestle by an order of the Corporation Commission made under legislative authority (C. S. §1044) the carrier cannot be made liable for the cost of making repairs, although necessary upon a side track and trestle to be used exclusively for the benefit of a private industry, p. 374.

Appeal and review — Scope of review — Suggestion of counsel — Brief.

2. A suggestion in a brief filed for an industry appealing a judgment dismissing its suit against a railroad for expense of side track maintenance that the carrier is liable for the amount expended for such repairs by reason of orders of the Director General of Railroads, issued during Federal control, was held not properly before the court in the absence of any pleading of evidence in support of the contention on the record, p. 375.

[December 7, 1927.]

ACTION by a private industry against a railroad for cost of maintenance of side track; judgment for railroad affirmed on appeal.

Action to recover of defendant a sum of money expended by plaintiff for repairs to a side track located on plaintiff's property, and also to recover damages resulting from the refusal of defendant to make said repairs.

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This side track includes a trestle, from which cars loaded with coal and shipped to plaintiff are unloaded; the trestle and the side track were constructed, and are used, for the convenience of plaintiff, in the operation of its factory.

From judgment of nonsuit, at the close of the evidence, upon motion of defendant, plaintiff appealed to the supreme court.

Appearances: R. T. Poole, of Troy, and T. W. Bruton and Walter Clark, of Charlotte, for appellant; Armstrong & Armstrong, of Troy, for appellee.

Connor, J.: [1] Defendant corporation is a common carrier of freight and passengers for hire, and, as such, is engaged in business in the state of North Carolina. It owns and operates a line of railroad, running through the town of Biscoe, in said state.

Plaintiff corporation owns and operates a factory or mill in the town of Biscoe, for the manufacture of cotton goods. Its factory or mill is located on the west side of defendant's line of railroad in said town of Biscoe.

At the date of the commencement of this action, and for many years prior thereto, there was a side or spur track running from defendant's main line of railroad to and on plaintiff's property. This side track was constructed and used for loading and unloading cars placed thereon by defendant for the convenience of plaintiff in the operation of its factory. It includes a trestle from which cars loaded with coal shipped to plaintiff are unloaded. This side track, according to defendant's blueprint, from the point at which it leaves the main line to its end on plaintiff's property, is 780 feet in length. It is approximately 450 feet on plaintiff's property. The trestle is altogether on plaintiff's property, and is used exclusively for unloading cars containing coal shipped to plaintiff, to be used in operating its factory.

Some time prior to the commencement of this action the said side track and trestle were in need of repairs. It was not safe to move cars on said side track and trestle for this reason. Defendant notified plaintiff that it would not move cars on the side track, or place them on the trestle until same had been repaired. A controversy thereupon arose between plaintiff and defendant

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with respect to which of them should pay for the repairs. It was agreed that plaintiff should cause the repairs to be made without prejudice to its contention that defendant was liable for the cost of the repairs. Plaintiff has expended the sum of \$408.85 for said repairs, and now demands judgment in this action that it recover said sum of defendant. It also demands judgment that it recover of defendant the sum of \$56.65, upon its allegation that it paid out this sum for drayage during the time defendant refused to place cars upon the side track and trestle.

There was no evidence upon the trial of this action tending to show that defendant or its predecessor had contracted, orally or in writing, to maintain the side track or the trestle in such condition that cars could be moved or placed thereon, with safety; nor was there evidence tending to show that said side track or trestle was constructed pursuant to an order of the Corporation Commission of North Carolina, as authorized by statute. C. S. § 1044. In the absence of a contract by which defendant was obligated to maintain said side track and trestle, or of an order of the Corporation Commission made under legislative authority, defendant cannot be held liable to plaintiff for the cost of making repairs, although necessary, upon the side track or trestle located on plaintiff's property, and used exclusively for plaintiff's benefit. The evidence is all to the effect that the sum which plaintiff seeks to recover in this action was expended in making repairs upon the trestle, which is used exclusively for the benefit of plaintiff.

[2] It is suggested in the brief filed for plaintiff in this court that defendant is liable to plaintiff for the amount expended for repairing the trestle by reason of orders of the Director General of Railroads, issued during Federal control. No evidence was offered at the trial in support of this suggestion; nor is there any allegation in the complaint that defendant is liable by reason of said orders. Whether defendant is liable for the repairs made to the trestle, as part of the side track, by reason of orders issued by the Director General of Railroads, is not presented or decided on this record.

Upon this record the judgment is affirmed.
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OKLAHOMA SUPREME COURT.

TULSA TRIBUNE COMPANY et al.
v.
OKLAHOMA NATURAL GAS COMPANY.

[No. 16563.]

(— Okla. —, 261 Pac. 213.)

Return — Duty of Commission to value useful utility property.

1. In determining what is a fair and reasonable rate, it is essential that the Corporation Commission determine the value of the property of the public utility used and useful in serving the people, p. 381.

Rates — Reasonableness — Burden of proof of one seeking special rate — Gas utility.

2. In a proceeding brought to abrogate such legal rates, and to substitute therefor special rates in favor of some particular person, corporation, or locality, the burden rests upon the complainant to establish that such uniform rates are unjust and unreasonable, p. 380.

Appeal and review — Conclusiveness of Commission findings — Gas utility.

3. An appeal from an order of the Corporation Commission, wherein was denied an application for the creation of a special zone for the city of Tulsa on account of favorable geographical location, as applied to the source of natural gas used to supply numerous cities and towns, the order of the Commission is prima facie reasonable, just, and correct by reason of § 22, art. 9 of the Constitution, and the burden is upon the appellant to overcome that presumption, p. 381.

[September 13, 1927.]

Headnotes by the COURT.

PETITION by inhabitants of a city and surrounding towns against a natural gas company for the inauguration of a special zone for gas rates and for a general adjustment of the rate schedule for all of the territory served; on appeal by petitioners from order of Corporation Commission, order affirmed. For Commission report, see P.U.R.1925D, 628.

Appearances: W. E. Disney, of Muskogee, and R. W. Stoutz and John Wheeler, both of Tulsa, for plaintiffs in error; D. A. Richardson and Ames, Lowe & Cochran, all of Oklahoma City, for defendant in error.

Riley, J.: This cause of action was brought before the Corporation Commission by plaintiffs in error above named on P.U.R.1928B.

behalf of themselves and all others similarly situated, inhabitants of the city of Tulsa and the surrounding towns of Dawson, Red Fork, and Turley. It is asserted in the application that, Tulsa being located in a favorable geographical territory with respect to the natural gas fields of the state, and particularly the Osage Nation from which the Oklahoma Natural Gas Company takes a portion of its gas, therefore, the city of Tulsa should be separated and segregated from other municipalities furnished by the transmission system of the respondent, that a zone should be created for the purpose of including therein that portion of the property used by the respondent in rendering service to Tulsa, and that the city of Tulsa be relieved from the burden of contributing any portion of the amount of money necessary to a reasonable return upon the property of respondent devoted to the general public service within the state of Oklahoma.

It is contended that the rate being charged by the respondent corporation, under its franchise, to gas consumers in the city of Tulsa, is excessive, and that the earnings resultant from that portion of the property used and useful in the service of gas to the city of Tulsa is grossly in excess of a reasonable rate, and that a temporary rate of not more than 40 cents per M cubic feet for domestic consumption and 15 cents per M cubic feet for industrial purposes be established by an immediate order to that effect, and that on final hearing the Commission promulgate a fair and reasonable rate, based upon the geographical and physical advantages enjoyed by the city of Tulsa, such final rate to be calculated upon the cost of producing and acquiring such gas and the cost of delivery thereof to the consumers, and omitting therefrom the necessity of contribution on the part of Tulsa toward any amount to constitute a reasonable return on property not used in the service of said city and towns similarly situated. Petitioners further prayed for a refund of all sums of money theretofore collected from said city in the form of excess rates since December 16, 1921.

The Corporation Commission set the hearing for December 31, 1924, and gave notice to the respondent. Evidence was offered by the petitioners tending to support the allegations P.U.R.1928E.

of the petition as to the amount of earnings in the city of Tulsa. The Commission took notice of the geographical location of Tulsa. The respondent offered no testimony, contending that the evidence offered by petitioners was based upon an erroneous assumption, in that it had not taken into consideration a valuation of the respondent's production or transmission property necessary to supply the city of Tulsa.

The Commission at the time of the hearing recited that for fifteen months past it had been engaged in an effort to arrive at a fair and just conclusion with respect to rates to be charged by the respondent at the city gates of cities and towns supplied by that corporation; that on June 19, 1923 (90 Okla. 84, P.U.R.1924A, 132, 216 Pac. 917), the supreme court handed down an opinion which reversed the Corporation Commission's Order, No. 1886, which had established a gate rate of 25 cents per M cubic feet for all cities and towns served by the Oklahoma Natural Gas Company, which opinion was filed after the Corporation Commission had been enjoined by the United States District Court for the Western District of Oklahoma from the enforcement of Order No. 1886; that the Supreme Court had fixed a gate rate of 38 cents for domestic purposes and 20 cents for industrial purposes, and that immediately thereafter the Commission had begun to revalue the properties of the Oklahoma Natural Gas Company throughout the state with the view of establishing a new rate to be charged all cities served by the respondent; that some twenty days had been consumed in taking testimony on the new matter by the Commission instituted, and that the trial of the cause had proceeded some ten or fifteen days prior to the filing of the petition herein.

The order of the Corporation Commission of January 5, 1925, concluded by consolidating the cause with Cause No. 5965, then being considered by the Commission for a determination of a general rate schedule for all municipalities served by the respondent company.

The petitioners filed a motion requesting a specific and immediate ruling by the Commission, first, whether it would grant the prayer for an emergency rate; second, that the Commission P.U.R.1928B.

make findings of fact as a predicate for appeal; third, to set aside the order of consolidation. On January 26, 1925, the Commission entered Order No. 2724, P.U.R.1925D, 628, being a finding of fact and setting forth the Commission's view and theory of the correctness of the general gate rate principle as applied to the situation under consideration, and denying an emergency rate as applied to the city of Tulsa. Thereupon petitioners perfected their appeal.

Subsequently, and on December 28, 1925, the Commission promulgated Order No. 3276, in Cause No. 5965, wherein the Commission, in the consolidated matter, after a valuation finding, reduced the city gate rate for all municipalities served by the respondent through its Enid and general system, by causing to be made a rate of 35 cents per M cubic feet, and ordering a deduction in like amount in distributing systems for domestic purposes effective January 1, 1926.

In the trial of this cause only one witness was produced; that one being a Mr. Grimes on behalf of petitioners, he having theretofore been an auditor for the Commission and an assistant auditor for the respondent company. He testified from a duplicate packet or annual report, secured from the office of the respondent company, the original of which had theretofore been filed with the Commission but misplaced.

Mr. Grimes testified that during the year 1923 a total of 3,445,841 M cubic feet of gas was sold by the Oklahoma Natural Gas Company in Tulsa for both domestic and industrial purposes, at an average rate of 45.97 cents per M cubic feet, which produced a gross revenue of \$1,593,920.79. He then undertook to determine the total cost of gas in Tulsa at the burner tip, and, in undertaking to show what the cost of gas was, he submitted a table as follows:

General expense	\$0.0205
Producing expense .....	.0101
Transmission expense .....	.0647
Royalties .....	.0063
Gas purchased .....	.0829
Taxes .....	.0189
Interest and other deductions0058
Distribution expense0239
Total cost at burner tip	\$2.231
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Having thus determined that the total cost of the gas at the burner tip was 23.31 cents per M cubic feet, Mr. Grimes testified that the cost of the 3,124,752 M cubic feet of gas sold in Tulsa for domestic purposes, at 23.31 cents per M cubic feet, was \$728,379.69, which, subtracted from the gross revenue produced by the sale of that much gas, to wit, \$1,492,149.17, left a gross profit of \$763,769.48. He then stated that, allowing the return fixed by the supreme court of Oklahoma on the value of the Tulsa distributing plant, the return for dividends and depreciation from the Tulsa distributing plant, to which the company was entitled, was \$474,554.16, which, subtracted from the actual gross profit of \$763,769.48, made the return actually received excessive by \$289,215.32, and he stated that he, therefore, deduced that the proper distribution rate in Tulsa was 38.05 cents per thousand cubic feet.

The Commission found that the evidence offered by the witness was not sufficient within itself to be taken as a basis for the relief sought; that, in calculating the cost of gas at the burner tip, the figures submitted included nothing but expenses, based on assumed value of the distributing plant and not considering any allowance upon the production or transmission property.

The defect in the figures reported by Mr. Grimes is that he has confused the cost of gas to the Tulsa gate with the cost of gas to the production and transmission property. The latter named instrumentality must maintain its property, pay taxes, and sell gas to the distributing systems for sufficient sums to pay a reasonable return upon the value of the property and allow a reasonable sum for amortization and depreciation. The rate to produce that sum was said by the court in 1923 (*Oklahoma Nat. Gas Co. v. Corporation Commission*, 90 Okla. 84, P.U.R.1924A, 132, 216 Pac. 917) to be 38 cents domestic and 20 cents industrial, per M cubic feet, and reduced 3 cents for domestic purposes by Cause No. 5965, Corporation Commission, December 28, 1925. So, in figuring an excess earning for the distributing plant of Tulsa, the figures used by Mr. Grimes omit the cost of the gas at the city gate.

[2] In *Atchison, T. & S. F. R. Co. v. State*, decided October 1928B.

ber 6, 1925, 115 Okla. 158, P.U.R.1926C, 574, 241 Pac. 776, this court held:

"In a proceeding brought to abrogate such legal rates and to substitute therefor special rates in favor of some particular person, corporation, or locality the burden rests upon complainant to establish that such uniform rates are unjust and unreasonable."

[1] Before the Commission could have said, and before we can say, that the rates charged the city of Tulsa are unjust, there must be a valuation for all property used and useful in the particular public service. The gate rate previously fixed was not taken as a basis for the relief sought, consequently a temporary order reducing the rates could not have been made unless it should be made to appear that the earnings of the company under the existing rates exceeded the amount theretofore held to be an adequate return on the investment. Such facts did not appear. *Muskogee Gas & E. Co. v. State*, 86 Okla. 58, P.U.R.1922E, 514, 206 Pac. 242; *Oklahoma Gas & E. Co. v. Corporation Commission*, 83 Okla. 281, P.U.R.1922A, 336, 201 Pac. 505; *Oklahoma City v. Corporation Commission*, 80 Okla. 194, P.U.R.1921C, 801, 195 Pac. 498.

[3] Under § 22, art. 9, of the Constitution:

" . . . The action of the Commission appealed from shall be regarded as *prima facie*, just, reasonable, and correct."

See *Atchison, T. & S. F. R. Co. v. Miller*, 28 Okla. 109, 114 Pac. 1104; *Atchison, T. & S. F. R. Co. v. State*, 28 Okla. 476, 114 Pac. 721.

We are of the opinion that, inasmuch as the Corporation Commission was in progress of a trial involving the value of the property used and useful in supplying gas to the city of Tulsa, together with other cities and towns, and in the absence of evidence that the respondent company was earning more than that allotted to it as a fair return on its valuation, the Commission was without authority to make a temporary rate in advance of a determination of the value of the property used.

The petitioners requested the Commission to take notice of the location of the city of Tulsa with respect to the gas fields. P.U.R.1928B.

No evidence was adduced in respect to the feasibility of creating zone rate as prayed for by petitioners.

In the previous rate case applicable to the respondent company, resulting in Order No. 1886, the Commission found it impossible to fix zone rates and recited (14 Ann. Rep. Okla. C. C. 1921, p. 391):

"It is impossible to allocate any particular gas wells, compressor stations, and pipe lines of the Oklahoma Natural Gas Company to any certain towns or cities, and for that reason it is practically impossible to fix the rates of each town and city upon the basis of the value of any special and particular property used and useful in serving that particular town and city. The gas wells, gas leases, pipe lines, and compressor stations furnish gas to all the various towns and cities; and gas is put into the line at both ends of the system and at many and various places between."

The Commission in its order of January 26, 1925, P.U.R. 1925D, 628, herein recited that the foregoing theory adopted in Order No. 1886 was the structure of rates it had applied to the Oklahoma Natural Gas Company, and that the principle should not be departed from except upon a full and complete hearing, and that it was not justified in temporarily adopting zone rates under the meager evidence before it. We agree that, in the absence of testimony showing what production and transmission property would be embraced by the use of the city of Tulsa, and the value of it, no order could be made making the city of Tulsa a unit for zoning purposes. In the record we find no evidence as to the proper amount of property to be considered in a zone of the city of Tulsa, nor as to the value of any such property. We must of necessity, in the absence of evidence, hold that the order of the Commission in regard to a special zone district for the city of Tulsa is a proper one.

The order of the Corporation Commission is affirmed.

Branson, C. J., Mason, V. C. J., and Phelps, Lester, Hunt, and Clark, JJ., concur.
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PENNSYLVANIA PUBLIC SERVICE COMMISSION.

RE DUQUESNE LIGHT COMPANY.

[Application Docket No. 17,442.]

Eminent domain — Condemnation of property for "maintenance" of utility service — Electricity.

An electric utility desiring to enlarge its plant in the interest of public convenience and necessity may acquire underlying strata from which coal and fire clay is mined in order to eliminate the danger of subsidence to the new extension, under an act (1921) giving to an electric company the right to appropriate property necessary for its corporate use in the "maintenance" as well as the "construction" of its buildings and plants.

[December 12, 1927.]

APPLICATION of a power company for the approval of the exercise of the right of eminent domain in acquiring coal and fire clay belonging to a brick company underlying a certain parcel of ground; approved.

By the **Commission**: The Duquesne Light Company has applied in this proceeding for Commission approval of the exercise of the right of eminent domain under the Act of May 21, 1921, P. L. 1057, in acquiring the coal and fire clay belonging to the Westmoreland Brick Company underlying a certain described tract of land. The coal and fire clay underlie in a general way the property upon which the electric company's valley sub-station is now located and upon which the company plans to construct certain additions.

The public convenience and necessity for the service to be rendered by this acquisition, and also the power of applicant to acquire underlying strata adversely, are denied by the brick company. It appears of record, however, that the applicant desires to enlarge its plant in order to provide further for the protection of its service in this section, and to provide more adequately for its high power interconnection with the Pennsylvania-Ohio Power Company, and that its engineers consider this sub-station the proper point for this development. In order to protect the existing plant at this point, as well as the contemplated additions to it, it is necessary that the danger of P.U.R.1928B.

subsidence be eliminated, and this can be accomplished by the condemnation of the strata beneath and adjacent to it.

As to the legal questions raised by the protestant, it is to be noted that the Act of 1921 gives to an electric company the right to appropriate property necessary for its corporate use in the "maintenance" as well as the "construction" of its buildings and plants. Therefore, upon a consideration of the record before it, the Commission finds that the service to be furnished by the company through this exercise of its power of eminent domain is necessary or proper for the service, accommodation, convenience, or safety of the public.

A certificate of public convenience will issue evidencing the Commission's approval of the exercise of the power of eminent domain, subject to the following limitations agreed to of record by the parties, which do not affect the structural safety of the plant, to wit:

1. The certificate shall not prejudice any of the mining rights, easements, or privileges granted or reserved to or owned by the Westmoreland Brick Company, its successors or assigns, under any deeds to it or reservations in deeds from it, for any clay and/or coal in the tract in which the coal and/or clay are condemned by the Duquesne Light Company, or in any adjoining tract.

2. That the Westmoreland Brick Company shall have the right to remove such clay and/or coal as may be reasonably necessary or convenient for the extension of room No. 7, as shown on Exhibit No. 3, and for the connection of the existing workings with each other, provided, however, that no such extension or connection shall be more than twelve feet in width and/or less than 50 feet center to center from any room or entry existing at the time of such extension or connection.

3. That the Westmoreland Brick Company shall have the right to transport through the existing entries and rooms, any coal and/or clay hereafter mined out of any other tract or tracts now owned or hereafter to be acquired by said Westmoreland Brick Company.

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PENNSYLVANIA PUBLIC SERVICE COMMISSION.

BOROUGH OF SHAMOKIN

v.

ROARING CREEK WATER COMPANY.

[Complaint Docket Nos. 6452, 6509.]

EXECUTIVE BOARD OF THE UNITED MINE WORK-
ERS OF AMERICA, NINTH DISTRICT

v.

ROARING CREEK WATER COMPANY.

[Complaint Docket No. 6453.]

J. H. AND C. K. EAGLE, INCORPORATED

v.

ROARING CREEK WATER COMPANY.

[Complaint Docket No. 6454.]

CHRIST J. GOLDEN et al.

v.

ROARING CREEK WATER COMPANY.

[Complaint Docket No. 6455.]

TOWNSHIP OF COAL

v.

ROARING CREEK WATER COMPANY.

[Complaint Docket Nos. 6456, 6508.]

Valuation — Private road — Excess cost.

1. An estimated allowance for a private road of a water utility was reduced where the Commission was not convinced that a roadway of so excellent a type of construction was necessary for the purposes of the utility, p. 391.

Valuation — Property not used — Water utility.

2. Items of property not used by a public utility company should be deducted in a valuation for rate making, p. 391.

Valuation — Tools and equipment — Second-hand equipment — Joint use.

3. Deductions were made from estimates of the value of tools and equipment of a water utility for certain equipment items which might be classified as second hand and which were also used by another company, p. 392.

Valuation — Overheads — Engineering — Water utility.

4. An allowance of 3.5 per cent was made for engineering and construction and 1.25 per cent on land, p. 392.

Valuation — Going value — Development cost — Other factors.

5. Development cost of public utility business is not equivalent to or synonymous with going concern value but the determination of such value depends upon the consideration of the company's history, method of operation, character of plant and of service rendered, together with development cost and other pertinent facts, p. 393.

Depreciation — Water utility — Annual allowance.

6. The annual depreciation of a water utility was computed on the basis of .41 of one per cent of the depreciable property in a depreciated reproduction cost new estimate, p. 393.

Return — Operating expenses — Rate case cost — Amortization.

7. Costs incident to a rate proceeding which have been met from current revenues need not be amortized, p. 395.

[December 12, 1927.]

COMPLAINTS against water rates; sustained in part, and new tariffs ordered.

By the **Commission**: These proceedings involve the rates charged by the Roaring Creek Water Company under its tariff P. S. C. Pa. No. 2, effective April 1, 1925, and supplement thereto effective June 1, 1925. Complaints 6452-6456 relate to P. S. C. Pa. No. 2 and allege that the rates are unwarranted, unreasonable, excessive, and extortionate. Complaints 6508 and 6509 relate to the Supplement No. 1 to P. S. C. Pa. No. 2 which pertains to rates for public fire hydrants and alleges that the rates are unwarranted, unreasonable, excessive, and extortionate. Respondent company, in its answers, denied these allegations and avers the new schedule of rates are just, reasonable, and necessary and no larger than the respondent is entitled to charge.

The new rates affect domestic consumers about as follows:
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Flat rate basis (a) Home with only one outlet increased from \$6 to \$8 per year; (b) Home equipped with first outlet, hot water boiler, bath tub with lavatory, water closet, steam or hot water heater, increased from \$14 to \$20 per year; (c) Same as (b) with wash tray or laundry tub and automobile, increased from \$17 to \$24.50 per year. The meter rates result in annual bills of \$9.60, \$15.60, and \$21.60 for monthly consumption of 1000, 2000, and 3000 gallons, respectively; all three of which formerly were on a minimum charge of \$1 per month basis. The change in meter rates obviously reflects a more equitable basis of charge. The public fire hydrant rate was changed from \$10 to \$50 per hydrant per annum.

Respondent company serves water to the borough of Shamokin, and to the townships of Coal and Ralpho and vicinity in Northumberland county. All the complaints were filed prior to the effective date of the tariff and its supplement, and thus the burden of proof is upon the respondent. The complaints were consolidated for purposes of hearing.

Water service was first introduced into the borough of Shamokin by the Shamokin Water Company, which was created by a special act of the Pennsylvania legislature in 1866 and was incorporated by a decree of the court of common pleas of Northumberland county on August 5, 1872, under an Act of Assembly, approved March 11, 1857, entitled "An Act to Provide for the Incorporation of Gas and Water Companies."

The waters of Trout Run and Eagle Run in Coal township were first utilized, and the demand for additional supply becoming more urgent, the Shamokin Water Company was constrained to obtain additional water supply from the south branch of Roaring Creek. This source of supply had been acquired January 13, 1882, by parties who organized the Roaring Creek Water Company, which was incorporated November 11, 1884, under the Act of 1874.

In 1886 the Shamokin Water Company entered into an agreement with the Roaring Creek Water Company to purchase water on a rental basis of \$9,000 per annum, plus one-half of all net revenue of the Shamokin Water Company in excess of \$18,000. This agreement continued until September 30, 1895, at which P.U.R.1928B.

time the entire property of the Shamokin Water Company was leased to the Roaring Creek Water Company for a period of nine hundred ninety-nine years.

On May 18, 1885, the Anthracite Water Company was chartered under the Act of 1874, to supply water to Coal township and vicinity, Northumberland county. This company laid a pipe line through the village of Uniontown, adjacent to Shamokin, and in 1890 leased this line to the Shamokin Water Company. This lease was continued in effect until 1902, at which time the property of the Anthracite Water Company was leased to the Roaring Creek Water Company for a period of nine hundred ninety-nine years.

The Roaring Creek Water Company has been operating the properties of all three companies since 1895.

The present outstanding capital stock of respondent comprises 8,000 shares of common stock, par value \$50. Its authorized bonded indebtedness is \$1,500,000 of which \$900,000 has been issued. At the present time respondent owns 893 of the 956 shares of preferred stock and 2,718 of the 3,044 shares of common stock (both of \$25 par value) of the Shamokin Water Company. There are 40 shares, par value \$25, of the common stock of the Anthracite Water Company, on which respondent pays 7 per cent annually as rental.

Respondent company's sources of water supply are Roaring Creek, on which is located Dam No. 6, enlarged in 1924 from 600,000,000 to 1,330,000,000 gallons capacity, and Trout Run which is impounded in Dam No. 4 of 35,000,000 gallons capacity and Dam No. 3 of 1,500,000 gallons capacity. The transmission system consists of over twenty-five miles of cast iron pipe varying in size from 24 inches to 6 inches in diameter, and the distribution system consists of approximately forty-one miles of cast iron pipe, ranging in size from 20 inches to 3 inches in diameter.

There are three pumping stations in the system: (a) located about 4 miles westward from breast of Dam No. 6 and used to augment the capacity of transmission mains; (b) located near the breast of Dam No. 2 and used to insure adequate service to an industrial consumer; (c) located in Ferndale and used

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in conjunction with 150,000 gallon steel tank to serve this "High Service District." Two reinforced concrete equalizing reservoirs located about eight miles westward from Dam No. 6 serve their intended purpose at periods of maximum draft on the transmission system. There are also six smaller wood tanks located at various points on the distribution system. Service is being furnished to the borough of Shamokin, and to nearby communities known as Edgewood, Fairview, Ferndale, Marshalltown, Johnson City, Uniontown, and Overlook. There are about nine thousand consumers.

Accounting and engineering investigations of the books and property of respondent company were made by representatives of the parties.

Respondent submitted \$2,210,361 as the original cost of its consolidated property as of June 30, 1926. This did not differ materially from the figure submitted by the complainants. The statement includes the cost of some minor items which are not at present used and useful in the service of the consumers of Roaring Creek Water Company, but these cannot be definitely segregated, and respondent's figure will be accepted for the present purpose.

The parties submitted estimates of reproduction cost new and depreciated. The inventory and prices were taken as of April 1, 1925. Additions to property from date of inventory to July 1, 1926, were introduced later. The parties differ as to used and useful property, unit prices, overheads, and contractor's profit.

The respondent claims \$25,000 as the value of water rights. The water from Roaring Creek is used by the respondent; by the Locust Mountain Water Company, located up stream from the respondent's property; and by the Bear Gap Water Company, located below respondent's property. The water rights claimed are on the creek between the Bear Gap Company's property and the Susquehanna river. Respondent estimates these rights to be worth \$100,000 and includes one fourth in its valuation. Complainant estimates the value at \$30,000, the original cost, and allocates \$7,500 to respondent. The Com-P.U.R.1928B.

mission finds that \$10,000 should be included in respondent's reproduction cost estimate for this item.

For rights of way respondent claims \$4,527 and complainants allow \$7,728. The parties use the same unit price but complainants increased their allowance for rights of way because they claimed that Dams No. 3 and No. 5 and adjacent land should not be included in the estimate of used and useful property. The Commission finds that Dam No. 3 is used and useful. It finds the value for rights of way is \$5,687.

Six dams are listed by respondent as used and useful at a total estimated cost of \$761,748. Complainants allow but two, No. 6 and No. 4, at a figure of \$605,097. The Commission finds that Dams No. 3, No. 4 and No. 6 are used and useful. It will include in its estimate Dam No. 3 at respondent's figure, and Dam No. 4 at respondent's figure after adjustment for an error of computation in concrete paving, but allowing for an item of rip-rap on the downstream side of the dam. Relative to Dam No. 6, the Commission, after a careful study of the testimony pertaining to the construction, unit costs, overheads and other relevant evidence, will allow \$650,000 as a fair reproduction cost.

Respondent's appraisal for Water Supply Reservation includes 1995 and 1783 acres of land contiguous to Roaring Creek and Trout Run, respectively, at a total price of \$616,543.50. Complainants included 1910 acres above the breast of Dam No. 6 on Roaring Creek and 1219 acres on Trout Run, at a total price of \$78,225.

Respondent recently purchased a farm located below Dam No. 3, on which it has erected two compensating reservoirs. Complainants make no allowance for this land. Respondent purchased in December, 1924, 800 acres of watershed land on the north side of Trout Run Valley at a price of \$27.25 per acre. The Commission finds that 1910 acres on Roaring Creek and 1615 acres on Trout Run above the breast of Dam No. 3 are used and useful and that the fair value averages \$27.25 per acre. The value of the land, including the value of that part of the farm used for reservoir sites, is \$97,256.

For buildings on the reservation respondent claims \$35,544 P.U.R.1928B.

and complainants allow \$13,291. The Commission finds that the value of these buildings, to the extent that they are necessary in the public service, is \$17,200. In determining this item, deductions were made from respondent's estimate for a blacksmith shop, a building used by an employee of Bear Gap Water Company, a caretaker's house, a garage and tool house, a garage and a store house at Dam No. 6.

Respondent claims a total value of \$35,015 on a number of different parcels of land located in the borough of Shamokin and Coal township. Complainants appraise these lots at \$28,800. The Commission will allow \$31,540 for these items. Respondent uses but does not own two of these lots. Certain of the buildings erected on some of the other lots are used jointly by Bear Gap and Roaring Creek Water Companies. Respondent has allocated the value of these buildings between the two companies and the Commission applies the same allocation to the lots upon which they stand. For buildings in Shamokin the Commission allows \$34,030 in its reproduction cost estimate.

For the items of compensating reservoirs, tanks and stand-pipes and generating and pumping equipment, the Commission accepts respondent's estimates as fair and reasonable.

[1] In the light of all the testimony relative to the item of private road, the Commission is not convinced that a roadway of so excellent a type of construction is necessary for the purposes of the Roaring Creek Water Company and so finds that \$22,200 is a reasonable allowance for this item.

[2] Respondent's and complainants' figures for transmission system pipe lines are \$740,281 and \$577,161, respectively. The difference in the estimates is due to a difference in unit prices and contractor's profit, the substitution of leadite for lead in complainants' estimate, and the exclusion of six items of property by complainant. The Commission, after deducting the items not used and useful and adjusting respondent's unit prices on pipe, finds a reproduction cost new of \$657,718.

For the items of special castings in transmission and distribution systems, valves, plate girder bridges, tunnels, valves, and manhole boxes in distribution system, meters, auto trucks, and chlorinating apparatus, respondent's estimate is \$193,882 and P.U.R.1028B.

complainants' is \$179,229. The Commission will include \$192,737 for these items, making allowances for those units of property which the record shows are not used and useful.

For the item of pipe lines in the distribution system the Commission will include \$459,339, which it determines in a manner similar to that used in its determination for pipe lines in the transmission system.

[3] Respondent's estimate for office furniture and fixtures will be accepted. Deductions from respondent's figure for tools and equipment will be made for certain equipment items which the evidence indicates may be classified as second-hand and also used by Bear Gap Water Company. The Commission will allow \$5,760 for these items.

Respondent includes \$29,571 for materials and supplies and \$6,000 for cash working capital. Complainants allow \$26,065 and \$4,000 respectively for these items. The evidence indicates that the inventory of materials and supplies is somewhat above normal owing to recent constructions and meter installation being in progress. After a careful consideration of the elements involved in these two items, the Commission is of the opinion that \$25,000 should prove ample for these needs.

[4] The parties differed in the sums included in the estimates for overhead costs. The Commission finds the percentages used by respondent to be reasonable with the exception of its allowance for engineering, for which the Commission finds 3.5 per cent on construction, etc., and 1.25 per cent on land, etc., to be adequate.

The record shows net additions to fixed capital from date of inventory to June 30, 1926, to be \$113,903.86. A review of said additions indicates about \$108,950 applicable to the property of Roaring Creek Water Company, and this amount will be included in the Commission's estimate.

Respondent claims \$300,000 for going concern value on a depreciated reproduction cost new of \$3,613,158. Complainants make no allowance for this item. Respondent introduced two exhibits, one purporting to show that during the first ten-year period of the Shamokin Water Company, a deficit of \$14,600 had accrued. Complainants offered in evidence an exhibit

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covering the first fifteen-year period at the end of which a surplus of \$1,330 is realized. A return of 7 per cent was used in both calculations.

[5] Respondent's second exhibit is based upon an estimate of developmental cost of the business. The assumption is made that it will take three years to connect the 9,000 consumers, attaching 50 per cent the first year, 30 per cent the second year and 20 per cent the third year, and a calculation deducing a total deficit of \$287,339 is shown. The Commission does not agree that the developmental cost of the business is equivalent to or synonymous with the going concern value of a public utility property. The determination of such value depends upon many circumstances. From a consideration of the company's history, method of operation, character of its plant and of service rendered, developmental cost, and other pertinent facts, the Commission finds that the respondent company has a going concern value, in addition to the value of its physical property, in the amount of \$140,000.

The Commission finds a reproduction cost new, including a going concern value of \$140,000, as of June 30, 1926, of \$3,117,247, and same depreciated of \$2,958,500.

Respondent claims \$4,000,000 as the fair value of its property including an allowance of \$300,000 for going concern value. Complainants, exclusive of any allowance for going concern value, contend the fair value of this property to be \$2,000,000. Giving careful consideration to all the evidence and taking into consideration the fact that prices of several of the items in the cost estimates have reached lower levels since the date of the appraisal of respondent's property and that such lower price levels will probably remain effective for the next few years, the Commission finds that the present fair value of respondent's property is \$2,620,000, upon which a 7 per cent return will be reasonable.

[6] Respondent claims an allowance of \$12,200 for annual depreciation which is .41 of 1 per cent of the depreciable property in its depreciated reproduction cost new estimate. The Commission, using respondent's percentage, finds an annual allowance of \$9,600 will be fair and reasonable.

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Respondent's original estimate for operating revenue anticipated from the new tariff was \$271,718, and complainants estimated it to be \$315,950. The actual revenues derived from the new tariff for the first year were \$283,409. Complainants contend that this actual revenue is hardly representative owing to the unsettled conditions of the community during that year. From a study of the estimates submitted, type of consumers of respondent company and other pertinent factors, the Commission believes that the new tariff will yield approximately \$290,000.

Respondent asks for \$78,000 for operating expenses exclusive of Federal income taxes and depreciation. Complainants would allow \$50,000 as reasonable. From the record and giving consideration to respondent's testimony relative to operation of old and new pumping equipment and also weighing the evidence relative to maintenance of respondent's property and general officers' salaries, the Commission finds that a fair and reasonable amount for operating expenses, exclusive of depreciation and Federal income tax, is \$70,000.

Respondent estimated its Federal income tax at \$14,000 per year. This estimate is not based on the set-up used in its accounts. The tax is $13\frac{1}{2}$ per cent of the net taxable income. This income, making the allowable deductions as usually made on the books by respondent, will be approximately \$75,000. The tax, therefore, on the income received from operation, will be approximately \$10,125, and that amount will be allowed.

Based upon the foregoing findings and determinations, the Commission concludes that a fair annual gross revenue for the respondent should not be in excess of \$273,125, determined as follows:

7% return on \$2,620,000	\$183,400
Annual operating expenses	70,000
Annual allowance for depreciation	9,600
Federal income tax	10,125
	<hr/>
	\$273,125

Since this amount is \$16,875 less than would probably be produced over a period of years by P. S. C. Pa. No. 2, the Commission finds the rates in said tariff are, and for the future P.U.R.1928B.

will be, unjust and unreasonable to the extent that they produce an average annual return in excess of that amount. Therefore, the complaints will be sustained. An order will issue requiring respondent to file a new tariff, effective January 1, 1928, on not less than five days' notice to this Commission and the public, calculated to produce under the present conditions an annual operating revenue not in excess of \$273,125.

[7] Respondent's estimate for the expenses of this proceeding is \$40,000 and claimed an allowance of \$10,000 per year for three years to amortize this expense. As the costs incident to this proceeding have been met from current revenues there is no reason for making any further collections for that purpose.

There is nothing in the record relative to rates being discriminatory or unbalanced and with reference to the rate for public fire protection, the Commission, of its own general knowledge, is of the opinion this rate is not unfair or unreasonable per se.

It may be worth noting that the amount of \$16,875, which the Commission finds to be in excess of the fair allowable revenue, is approximately a 5 per cent reduction on the amount which it is estimated the present tariff will produce. The Commission, therefore, suggests that respondent, in filing its new tariff, give consideration to revising rule No. 4 of its rules and regulations by allowing a larger discount than at present on all flat rate water bills if paid within thirty days from the date same are due, and allowing a discount on all meter bills if paid within twenty days from the date same are due.

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MASSACHUSETTS SUPREME JUDICIAL COURT.

NEW ENGLAND TELEPHONE AND TELEGRAPH
COMPANY

v.

DEPARTMENT OF PUBLIC UTILITIES AND HOTELS
STATLER COMPANY, INCORPORATED.

(— Mass. —, 159 N. E. 743.)

Appeal and review — Matters of review not passed upon by Commission — Evidence.

1. The rule that the court will not hear evidence to review findings of fact made by the Public Utilities Department does not forbid the presentation of evidence to establish a petitioner's right of review where there has been no finding of fact material to it, p. 398.

Appeal and review — Commission findings on admissibility of evidence — Degree of evidence.

2. The court on review is not bound by the decision of the Commission that evidence is immaterial and can give it due weight where there is nothing to suggest that fuller or more convincing evidence than was introduced before the Commission is sought to be presented to the court, p. 399.

Constitutional law — Property rights — Forced purchase of privately installed service equipment.

3. An order of the Commission requiring that a telephone company become owner of privately installed service equipment which it may later be compelled to reject for incompatibility with service requirements is an unreasonable interference with its property rights, p. 405.

Commissions — Jurisdiction over telephone wiring.

4. The substitution of the judgment of others for that of the telephone company in the determination of whether certain wires are suitable and are properly installed is an interference with the right of management, which goes beyond the reasonable limit of public control, p. 405.

Interstate Commerce — Failure of Congress to regulate — Telephones.

5. Orders of the Commission regarding the proper installation of wiring are not void because they affect interstate transmission of telephonic messages in view of the fact that Congress has not legislated on the regulation of telephones used in interstate commerce, p. 406.

Service — Jurisdiction of Commission to compel utility to test private equipment.

6. Orders of the Commission imposing upon the telephone company the expense of investigating wires and wiring not selected and constructed under its direction are illegal, p. 406.

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Interstate commerce — Commission jurisdiction where Congress has regulated.

7. Orders of the Commission directly affecting interstate commerce within the sphere covered by congressional legislation are void, p. 407.

Service — Commission jurisdiction to hear complaints of telephone service.

8. Jurisdiction to receive and hear but not necessarily to decide a complaint concerning the refusal of telephone service over equipment alleged to be properly installed by the complainant resides in the Commission, under a law (G. L. chap. 159, § 16) giving it power to consider complaints of service by common carriers then or subsequently placed under its regulation, p. 407.

Interstate commerce — Restriction of Commission authority by state statute — Telephones.

9. The Commission has no jurisdiction to grant a remedy to a complaint against telephone service which affects interstate commerce under a law (G. L. Chap. 159, § 16) confining the supervisory and regulative power conferred to service in transmission "within the commonwealth," p. 407.

Service — Qualifications of complainant immaterial — Elements of valid complaint.

10. The personal merit of a complainant against utility service is immaterial if the practice which he brings before the Commission is one having public interest and is unjust, unsafe, improper, or inadequate and susceptible to lawful correction by Commission order, p. 409.

[January 9, 1928.]

PETITION to review order of Department of Public Utilities directing petitioner to furnish telephone service to hotel; order of Department annulled.

Appearances: J. N. Clark and C. S. Pierce, both of Boston, for plaintiff. C. F. Lovejoy of Boston and the Attorney General for defendant, Department of Public Utilities. L. A. Mayberry, W. V. Taylor and Harold W. Lewis, all of Boston for defendant, Hotels Statler Company, Incorporated.

Wait, J.: This is a petition under General Laws Chap. 25, § 5, to review rulings and orders of the Public Utilities Department which were made as a result of, or in the course of, proceedings before the Commission instituted under General Laws Chap. 159, § 16, by the Hotels Statler Company, Inc. (hereinafter called the Hotel Company) against the New England Telephone & Telegraph Company (hereinafter called the Telephone Company).

The petition is brought by the Telephone Company against P.U.R.1928B.

the Hotel Company and the five Commissioners who have the supervision and control of the Department, and it prays that the court will "review, modify, amend, or annul" the rulings and orders referred to in the petition, will decree that they are null and void, will stay their enforcement until further order of the court, and will grant such further relief as justice and equity require. The case came on to be heard in the Supreme Judicial Court for Suffolk county upon motion by the Hotel Company in which the Attorney General joined, that the case be reserved for the full court upon the petition and the answers thereto. The petition set out as exhibits the full evidence and arguments had before the Commissioners, the requests for rulings of both parties, and the decision and orders of the Department, with the petitions, amendments, and motions of the parties.

The Telephone Company objected, claiming that issues of fact were presented by the pleadings which should be passed upon before the case was ripe for determination. It offered proof upon three issues: the fact that the Telephone Company was engaged in interstate commerce which was affected by the orders; the fact that a contract existed between the Hotel Company and the Telephone Company which was invaded by the orders, and that the Hotel Company in instituting and prosecuting these proceedings was participating in an illegal conspiracy and had no standing to request the orders. The single justice ruled that the Telephone Company was not entitled to introduce any evidence under the petition, and that the case must be decided upon the record of the proceedings before the Commission. To this the petitioner excepted. It made an offer of proof which, subject to its exception, was rejected. The single justice thereupon, also subject to exception, reserved the case for the full court, and reserved and reported it upon the petition, answers, offer of proof, rulings thereon and exceptions thereto.

The petitioner presses these exceptions.

[1] The law is established that, upon an appeal under General Laws Chap. 25, § 5, the court will not hear evidence to review or revise findings of fact made by the Department. No power is given to rehear facts. *Boston & A. R. Co. v. New York C. R. Co.* 256 Mass. 600, 617 et seq., P.U.R.1927A, 259, P.U.R.1928B.

153 N. E. 19; *Salem v. Eastern Massachusetts Street R. Co.* 254 Mass. 42, 45, P.U.R.1926B, 640, 149 N. E. 671; *Donham v. Public Service Commission*, 232 Mass. 309, 327, 328, P.U.R. 1919C, 880, 122 N. E. 397. The parties must not withhold evidence from the Department and produce it in court. See *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 196, 40 L. ed. 935, 16 Sup. Ct. Rep. 700; *Washington ex rel. Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 526, 56 L. ed. 863, 32 Sup. Ct. Rep. 535. Where, however, there is no finding of fact material to the petitioner's right to review, this rule does not forbid the presentation of evidence to establish it. Such evidence is not offered in rehearing of issues of fact decided by the Department but as the basis in fact to support a claim of right. Unless such evidence is admissible, the right to review given by the statute is not broad enough to secure due process of law, and the statute may be rendered unconstitutional. See *Opinion of Justices*, 251 Mass. 569, 611, 613, 147 N. E. 681. There must be a fair opportunity for submitting the issue of confiscation or of undue interference with the right of management to a judicial tribunal for determination upon its own independent judgment as to both law and facts. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287, 64 L. ed. 908, P.U.R.1920E, 814, 40 Sup. Ct. Rep. 527; *Bluefield Water Works & Improv. Co. v. Public Service Commission*, 262 U. S. 679, 689, 67 L. ed. 1176, P.U.R. 1923D, 11, 43 Sup. Ct. Rep. 675; *Ohio Utilities Co. v. Public Utilities Commission*, 267 U. S. 359, 69 L. ed. 656, P.U.R. 1925C, 599, 45 Sup. Ct. Rep. 259; *Northern P. R. Co. v. Department of Public Works*, 268 U. S. 39, 69 L. ed. 837, P.U.R. 1925D, 93, 45 Sup. Ct. Rep. 412; *Washington ex rel. Oregon R. & Nav. Co. v. Fairchild*, *supra*.

[2] In the case before us there is evidence reported which justifies findings in accord with the contentions of the petitioner. While it is true that the Commission made no such findings, neither did it find to the contrary. This court is not bound by the decision of the Commission that the evidence was immaterial, and can give it due weight. There is nothing to suggest that fuller or more convincing evidence than was introduced before the Commission was sought to be presented to the court. P.U.R.1928B.

The petitioner, consequently, has not been prejudiced by the refusal to take the evidence offered and its exceptions in connection therewith are, therefore, overruled.

We do not pause to determine whether a respondent can maintain a motion to reserve a case for the full court upon the petition and answers. The petitioner has not argued the matter and we treat it as waived.

It is not necessary to take up *serialim* the many requests and rulings presented. The plaintiff has discussed them under five headings and we shall deal with them in the same way.

Material facts may be stated as follows: The Hotel Company contemplated the erection of a large building in Boston to be used in part for offices and in part as a hotel with a large number of rooms for guests and for hotel purposes. Telephone service both for offices and hotel use was essential to the financial success of the undertaking. The Telephone Company was in control of furnishing such service. In 1922 the Hotel Company began negotiations with the Telephone Company with regard to telephone service. The plans for the building were submitted to the Telephone Company and it entered upon a study of the structural and mechanical problems to be considered in supplying such service as the Hotel Company required. These studies and negotiations resulted in an understanding that the building would be constructed in accord with certain plans which eventually provided for construction of conduits for telephone wires by the hotel company in the building, and construction of cables, switchboards, wires, etc., by the Telephone Company, to be placed by it in the streets for connections between the building and the telephone exchange, or in the building for the appliances to be installed there. The conduits forming part of the building were the property of the Hotel Company. The telephone material was to remain the property of the Telephone Company and subject to its control, although attached to the building. The only payment to be made the telephone company was the usual service charge for service and installation of the telephones in the building to be paid by individual subscribers, of whom the Hotel Company would be one. These negotiations did not result in a written contract. That, however, a contractual relation existed be-
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tween the companies is manifest. It was understood that the telephone wiring was to be done by the Telephone Company. The Hotel Company was to have a building equipped with conduits according to the structural plan agreed upon, and the Telephone Company was to create, have ready, and install whatever else was necessary for telephone service to, from, and within the building. Both companies incurred large expense in their preparations. In contracting for the erection of the building the Hotel Company made no contract, and no sub-contract was made, for supplying materials or labor for the telephone wiring.

The Telephone Company's practice has been to own, control, and install by workmen in its employ all telephone apparatus and all wiring which enters into the transmission of speech over its system and its connections. A few exceptions to this practice exist, but it has been maintained substantially without exception. It was the expectation of the Telephone Company that it would be followed in this case. We think it must be assumed that the Hotel Company was aware of both practice and expectation. The construction of the building went forward till, in 1926, occasion arose for the pulling of wires from the feed cable, already laid by the Telephone Company, through certain of the conduits to places where the telephones were to be set up. Then workmen, employed by the subcontractor for all wiring other than that which it had been contemplated the Telephone Company should install, insisted that the pulling of these telephone wires should be done by union workmen affiliated with the American Federation of Labor. The employees of the Telephone Company were not so affiliated. Strikes, first of the employees of the wiring sub-contractor and later of all workmen employed on the building, were inaugurated to compel compliance with this demand. There was no trade dispute between the wiring sub-contractor and his workmen, nor between the other workmen on the building and their several employers, nor between the Telephone Company and its employees. There were, however, strikes. The Hotel Company was threatened with great loss if the speedy completion and use of its building was delayed, and also with great loss if

neither itself nor its tenants could secure telephone service. The Telephone Company was threatened with great loss, if it departed from its practice of insisting upon installation of telephone wiring by its employees, if it were unable to use the material prepared specially at great expense for use in the building; and also if it departed from its understanding with its employees that all telephone wiring should be done by them. The Hotel Company sought the assistance of the Telephone Company. The latter refused to depart from its practice, but offered to give telephone service if admitted to the building. The former was willing to do anything it could consistent with avoiding strikes; but could not allow men to work in the building pulling wires who were not affiliated with the American Federation of Labor.

The situation was deliberately brought about by the union men either to force the employment of union labor affiliated with the American Federation of Labor by the Telephone Company, or to compel it to abandon its policy of having all telephone wiring pulled by its employees. The Hotel Company made no appeal to the courts.

Wires were pulled by these union employees to room 727, and thereupon the Hotel Company requested of the telephone company telephone service at that room. The Telephone Company declared its readiness to furnish the service by means of wires owned and controlled by it and pulled by its employees. The Hotel Company demanded service over the wires already installed. This was refused. The Hotel Company petitioned the Department under General Laws Chap. 159, § 16, to compel service over the wires installed by the sub-contractor's men and to order that the Telephone Company discontinue the policy of refusing to connect telephones to and to give service over wires installed by others than its own employees. Other prayers were made, but enough is indicated to meet the requirements of this decision. The Commission decided that the wires so pulled are of the kind usually used by the telephone company for the sort of service requested, are appropriate and adequate, are properly installed, and connecting with them would not impair or interfere with the service of

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that company. After hearing the evidence set out as exhibits to the petition, the Commission determined that "the just and reasonable practice hereafter to be in force and to be observed by the New England Telephone & Telegraph Company with respect to applicants who properly install wires suitable for the service applied for, and who, prior to or at the time of the connection of the Telephone Company's service, convey title to and surrender control of such wires to the Telephone Company without charge, is that the Telephone Company furnish such applicants telephone service by connecting with such wires, and hereby fixes and prescribes the same by order to be served upon the New England Telephone & Telegraph Company," and further ordered the Telephone Company to furnish service of a specified classification to room 727 "by connecting with the wires now pulled to that room from the basement of said building."

The petitioner contends that the orders are invalid because the Department has acted in contravention of the constitutional rights of the Telephone Company by unlawfully invading its right of management of its private property and business; by unlawfully requiring it to employ its private property in a service which it has not undertaken or professed to render; and by unjustly and unreasonably interfering with its private property rights by orders which are in themselves unreasonable. It does not deny that it is engaged in "the transmission of intelligence within the Commonwealth . . . by means of telephone lines" and "by the operation of all conveniences, appliances, instrumentalities, or equipment appertaining thereto or utilized in connection therewith;" and is, thus, by General Laws Chap. 159, § 12 (d), subjected to the general supervision and regulation, jurisdiction and control of the Department of Public Utilities. The law is settled that the exercise of such control is constitutional (*Vermilye v. Western U. Teleg. Co.* 207 Mass. 401, 93 N. E. 635), and that to some extent the property and the right of management of the persons furnishing such service for public use may be affected and curtailed. *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. P.U.R.1923B.

1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585; *Postal Teleg. Cable Co. v. Chicopee*, 207 Mass. 341, 347, 93 N. E. 927.

Nevertheless their property cannot be taken without compensation, nor their right of management be unreasonably curtailed under the guise of supervision, regulation, and control. *Public Utility Comrs. v. New York Teleph. Co.* 271 U. S. 23, 70 L. ed. 808, P.U.R.1926C, 740, 46 Sup. Ct. Rep. 363. They cannot be required to furnish a service which they do not hold themselves out as undertaking to furnish. See *Missouri P. R. Co. v. Larabee Flour Mills Co.* 211 U. S. 612, 619, 53 L. ed. 352, 29 Sup. Ct. Rep. 214. This, however, does not enable them to defeat regulation by professing an undertaking to furnish the service only in a particular way. See *Western U. Teleg. Co. v. Foster*, 224 Mass. 365, P.U.R.1916F, 176, 113 N. E. 192.

We cannot agree that the Telephone Company's profession of service is as limited as the company claims. It offers to transmit intelligence by telephone instruments over telephone lines. The offer is not merely for transmission by such means, in such ways, and by such persons as it pleases. In return for the rights in ways and elsewhere contributed by the public it must yield something of unlimited discretion in the use of its property and the management of its business. The question before us is, whether the limitation established by the Department is warranted by the law. It is not so warranted if it is unreasonable. *Washington ex rel. Oregon R. & Nav. Co. v. Fairchild*, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535. See *People ex rel. Woodhaven Gas Light Co. v. Public Service Commission*, 269 U. S. 244, 70 L. ed. 255, P.U.R.1925E, 827, 46 Sup. Ct. Rep. 83; *Pennsylvania Gas Co. v. Public Service Commission*, 252 U. S. 23, 64 L. ed. 434, P.U.R.1920E, 18, 40 Sup. Ct. Rep. 279. Whether this order is reasonable, on the record is a question of law. If it were not, then this court could not act in review of the order made because, by the statute authorizing the appeal which brings it before us, the jurisdiction granted is "to review, modify, amend, or annul any ruling or order of the Commission, or of any member or members representing the Commission, but only to the extent of the P.U.R.1928B.

unlawfulness of such ruling or order." General Laws Chap. 25, § 5. The court cannot intervene because of any difference of opinion with regard to the wisdom of any order made in the exercise of their jurisdiction by the Commissioners of the Department. *People ex rel. New York & Q. Gas Co. v. McCall*, 245 U. S. 345, 62 L. ed. 337, P.U.R.1918A, 792, 38 Sup. Ct. Rep. 122. Only to the extent that it transcends the law can we deal with it. *Salem v. Eastern Massachusetts Street R. Co.* 254 Mass. 42, P.U.R.1926B, 640, 149 N. E. 671.

[3, 4] The Telephone Company insists that the proper performance of its function in the transmission of speech requires that it shall own and control the wires over which the transmission of speech takes place. See *Gardner v. Providence Teleph. Co.* 23 R. I. 262, 49 Atl. 1004. The Commission confirms this claim by requiring in its orders that one insisting on service shall convey title to the wires and surrender control of them to the Telephone Company. The company further insists that such proper performance also necessitates that the wires be pulled or put in place by workmen subject to its control; for only thus can it be assured that they are proper and properly installed. The Commission denies this claim, and by its order required that, without regard to who has selected the wires and put them in place, the company shall connect with them if they are properly installed and suitable for the service applied for. The Commission declares that if experience should demonstrate that the service over the wires to room 727, to which it orders the Telephone Company to connect, cannot be given without impairing its general service, it would be justified in discontinuing the service until it could remedy the defect. See *Northern P. R. Co. v. Department of Public Works*, 268 U. S. 39, 45, 69 L. ed. 837, P.U.R.1925D, 93, 45 Sup. Ct. Rep. 412. Thus it requires the Telephone Company to become owners of property which later it may be called on to reject because it is incompatible with performing the service which it undertakes to give. This is an unreasonable interference with its rights of property. The determination whether certain wires are suitable and are properly installed is a detail of management in the administration of the P.U.R.1928B.

business of the Telephone Company. To substitute the judgment of others for that of the Telephone Company in that matter is an interference with the right of management which goes beyond the reasonable limit of public control. It is similar to the control attempted to be exercised by the state of Wisconsin in requiring the upper berths in sleeping cars to be kept closed when not in use, which was held to be unconstitutional in *Chicago, M. & St. P. R. Co. v. Wisconsin*, 238 U. S. 491, 59 L. ed. 1423, P.U.R.1915D, 706, 35 Sup. Ct. Rep. 869, L.R.A. 1916A, 1133. See also *Missouri ex rel. Southwestern Bell Teleph. Co. v. Public Service Commission*, 262 U. S. 276, 67 L. ed. 981, P.U.R.1923C, 193, 43 Sup. Ct. Rep. 544, 31 A.L.R. 807; *Banton v. Belt Line R. Corp.* 268 U. S. 413, 69 L. ed. 1020, P.U.R.1926A, 317, 45 Sup. Ct. Rep. 534; *Great Northern R. Co. v. Minnesota*, 238 U. S. 340, 59 L. ed. 1337, P.U.R.1915D, 701, 35 Sup. Ct. Rep. 753. No general conditions of public necessity are shown to make the orders appropriate and essential for the adequate and equal performance of the service for the public. The decision of the Department discloses that the action is taken to put an end to a particular instance of hardship.

[5, 6] The Telephone Company contends that the action taken is an interference with interstate commerce, and is thus beyond the power of the Department. There is no dispute that telephone instruments installed in the building will be used in transmitting intelligence not only within this Commonwealth but also throughout the United States and elsewhere in the world where telephonic communication is maintained through connection with the lines of the Telephone Company, and that while so transmitting speech the instruments and wires will form part of one whole extending from the speaker to the ultimate receiver. No discussion is necessary to show that such service is interstate in character, and that the person rendering it is engaged in interstate commerce. The orders affect interstate commerce. That, however, of itself, does not render them void. *Western U. Teleg. Co. v. Crovo*, 220 U. S. 364, 55 L. ed. 498, 31 Sup. Ct. Rep. 399. Congress has not yet undertaken by legislation to regulate the use of the telephone in interstate com-
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merce, and until it acts there is a field for activity by the state. See Minnesota Rate Cases, 230 U. S. 352, 398, 402, 57 L. ed. 1511, 33 Sup. Ct. Rep. 729, 48 L.R.A.(N.S.) 1151, Ann. Cas. 1916A, 18; Di Santo v. Pennsylvania, 273 U. S. 34, 71 L. ed. 524, 47 Sup. Ct. Rep. 267; Postal Teleg. Cable Co. v. Chicopee, *supra*; Vermilye v. Western U. Teleg. Co. *supra*. If the action taken under authority from the state burdens interstate commerce, then it is beyond the power of the state and is invalid. Western U. Teleg. Co. v. Foster, 247 U. S. 105, 62 L. ed. 1006, P.U.R.1918D, 865, 38 Sup. Ct. Rep. 438, 1 A.L.R. 1278; Napier v. Atlantic Coast Line R. Co. 272 U. S. 605, 71 L. ed. 236, P.U.R.1927B, 537, 47 Sup. Ct. Rep. 207; Oregon-Washington R. & Nav. Co. v. Washington, 270 U. S. 87, 70 L. ed. 482, 46 Sup. Ct. Rep. 279. The orders in question impose such a burden. Compare Public Utilities Commission v. Attleboro Steam & Electric Co. 273 U. S. 83, 71 L. ed. 309, P.U.R. 1927B, 348, 47 Sup. Ct. Rep. 294. It is manifest that expense is imposed upon the telephone company if, as is certain, it must undertake investigation of wires and wiring not selected and constructed under its direction, and be charged with disposing of them if found unsuitable. The orders, consequently, are illegal.

[7] We do not rest our decision upon any interference with the sphere of control assumed by Congress under the Act of February 28, 1920, Chap. 91, § 418 (49 USCA § 15, Comp. St. § 8583). That section seems to us to deal with rates and charges and practices relating thereto. The orders in question do not relate to rates and charges. If we are wrong in this, there can be no doubt that the orders effect directly interstate commerce within the sphere covered by congressional legislation and, beyond question, are void.

[8, 9] The petitioner further contends that the Commission was without jurisdiction to make either the general or the special order. We understand this to refer to jurisdiction conferred by the Commonwealth. It maintains that such jurisdiction as exists to require service to be furnished as the result of an application by an individual is conferred by G. L. chap. 166, §§ 13, 14 (originally Stat. 1885, Chap. 267), and by that statute (§ 15, [§ 3 of the original act]) is vested in the su-

perior and the supreme judicial courts. Such administration, supervision, and control over the transmission of intelligence by electricity as existed before the creation of the Department of Public Utilities was **first** provided for by Stat. 1906, Chap. 433, and was conferred upon the Massachusetts Highway Commission by that act. In 1913 the powers of the Highway Commission over the service were transferred to the Public Service Commission, Stat. 1913, Chap. 784, and additional authority was conferred upon the latter. Section 29 declared that the act was to be construed as remedial and "in enlargement and extension of all previous acts and existing laws conferring upon or vesting in the Commission any jurisdiction, powers, or discretion with respect to any subject or matter treated in this act." The "Commission" here referred to was created by the act. No authority had previously been given it. The words must be taken to refer to jurisdiction, powers, or discretion wherever existing formerly, which were vested in the Public Service Commission by the statute. So understood, it results that language, which, when it was earlier used, related to carriers in services other than the transmission of intelligence by electricity, was henceforth to be applicable, so far as it was appropriate, to the service rendered by persons engaged in the transmission of intelligence by electricity. Section 23 provided that "whenever the Commission shall be of opinion, after a hearing had upon its own motion or upon complaint, that the regulations, practice, equipment, appliances, or service of any common carrier now or hereafter subject to its jurisdiction, are unjust, unreasonable, unsafe, improper, or inadequate, the Commission shall determine the just, reasonable, safe, adequate, and proper regulations and practices thereafter to be in force and to be observed, and the equipment, appliances, and service thereafter to be used and shall fix and prescribe the same by order to be served upon every common carrier to be bound thereby." The petition of the Hotel Company complaining of the Telephone Company was based upon this section, which, after amendment here unimportant by Stat. 1916, Chap. 244, had become General Laws Chap. 159, § 16. It is within its language; and, although it asks for other action in addition and P.U.R.1928B.

may be too broad, it is a complaint thereunder. We have no doubt that the Commission had jurisdiction to consider the complaint. The jurisdiction exists, although the action taken may transcend it. We do not agree with the contention that a complaint based upon a refusal of service to an individual can be brought only under General Laws Chap. 166, § 14. Jurisdiction to consider it may also be conferred by General Laws Chap. 159, § 16. The statute, however, by express terms confines the supervisory and regulative power which it confers, to service in transmission "within the Commonwealth." The service sought to be secured by the Hotel Company and affected by the practice of which it complained, was not so limited. As we have already decided, interstate commerce was affected, and, in this case, therefore, the orders made were beyond the power of the Commission. Jurisdiction to receive and hear existed, but not jurisdiction to grant the remedy actually decided upon. It is not necessary to define further the limits of jurisdiction severally conferred by General Laws Chap. 166 and General Laws, Chap. 159.

[10] The contention of the petitioner that the Hotel Company had disqualified itself by its conduct from securing favorable action from the Commission, and that the order should be set aside for that reason, need not be considered at length. The findings of fact made by the Commission as matter of law established that the strikes were illegal. *A. T. Stearns Lumber Co. v. Howlett*, Mass. Adv. Sh. (1927) 1173, 157 N. E. 82, and cases there cited. Compare *Anderson v. Shipowners Asso.* 272 U. S. 359, 71 L. ed. 298, 47 Sup. Ct. Rep. 125; *United States v. Brims*, 272 U. S. 549, 71 L. ed. 403, 47 Sup. Ct. Rep. 169; *Bedford Cut Stone v. Journeymen Stone Cutters Asso.* 274 U. S. 37, 71 L. ed. 916, 47 Sup. Ct. Rep. 522.

The position of the Hotel Company, however unfortunate, was that of a participant in an unwarranted combination. *Aberthaw Construction Co. v. Cameron*, 194 Mass. 208, 80 N. E. 478. We think, however, that the decision of the Commissioners is sound, that as a general proposition, the personal merit of the complainant is immaterial if the practice which he brings before the Department is one in which the public generally has

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an interest and is unjust, unreasonable, unsafe, improper, or inadequate, and that a valid order can be made thereon, in appropriate circumstances. In the particular case before us, circumstances are not appropriate.

It follows that the orders appealed from must be annulled, and it is so ordered.

UTAH PUBLIC UTILITIES COMMISSION.

LOGAN CITY

v.

UTAH POWER & LIGHT COMPANY.

[Case No. 984.]

Municipal plant — Jurisdiction of Commission — Electricity — Rates.

1. The Public Utilities Commission is charged with the duty of regulating the practices, rates, and charges of municipally owned as well as privately owned public utilities operating for hire in the state of Utah (§ 4782, Compiled Laws of Utah, 1917), p. 423.

Procedure — Commissions — Rules and regulations — Procedure at hearing.

2. Rules of pleading and practice and the technical rules of evidence that are to be observed by the trial courts, do not apply to hearings before the Public Utilities Commission (§ 4820, Chap. 5, Compiled Laws of Utah, 1917), p. 429.

Municipal plant — Proprietary capacity — Utility business.

3. A city or other municipal corporation going into a utility business takes upon itself the character of an ordinary commercial concern in its proprietary capacity and to that extent ceases to function in its governmental capacity, p. 429.

Rates — Municipal plant — Burden on taxpayers.

4. As long as taxpayers are required to continue to pay taxes to a city to maintain and operate the city's electrical plant in order that its patrons may be served with electrical energy below cost the rates of such a plant remain unjust, unreasonable, and in violation of the law, p. 430.

Rates — Duty of Commission to establish sufficient rate — Electricity.

5. The Commission is enjoined to establish just and reasonable rates for a public utility in all cases where the reasonableness of the same are brought into question and are shown to be otherwise, under a law (§ 4800 Compiled Laws of Utah, 1917) directing the Commission, upon finding that rates charged or collected by any utility for any

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service to be insufficient, to determine sufficient rates, and charges therefor, p. 432.

Rates — Test period — Competitive rate cutting — Electricity.

6. A private utility whose previous flat rates were shown to be discriminatory and wasteful and a competing city plant whose proposed meter rates were insufficient to pay operating cost, thereby burdening taxpayers, were both ordered to charge equal meter rates for a test period of one year in view of the fact that competitive conditions and uncertain consumption did not warrant a permanent finding of reasonable rates for either utility at that time and a subsequent order could permit a reduction by either plant upon a showing that its revenues permitted the same, p. 432.

[December 23, 1927.]

COMPLAINT by a municipal electric utility against a privately owned competitor for an alleged violation of a contract to install meter rates; meter rates ordered established by both utilities.

Appearances: Leon Fennesbeck, City Attorney, of Logan, for complainant, Logan City; John F. MacLane and George R. Corey, Attorneys, of Salt Lake, for defendant, Utah Power & Light Company; Ernest T. Young, Attorney, of Logan, for individual protestants, as citizens and taxpayers of Logan City (interveners); individual complainants, as citizens and taxpayers of Logan City, (interveners).

By the **Commission**: On the 4th day of August, 1927, Logan City, a municipal corporation, filed with the Public Utilities Commission a complaint, in substance and effect alleging that it is the owner of and engaged in the operation of electrical power plant and distribution system, for the supplying of electrical energy and power to its citizens and customers for hire; that the defendant, Utah Power & Light Company, is the owner of an electric power system, operating for hire throughout the states of Utah and Idaho, and supplying its customers with electrical energy, among which is included a large number of the citizens of Logan City; that the distribution systems of the complainant and defendant, within Logan City, parallel each other and are in constant competition with each other, the result of which has been that the rates accorded the consuming public have not been predicated on the amount of electrical power and energy used and consumed by their respective customers, but are P.U.R.1928B.

based on what is commonly known as "flat rates," or unmeasured service, resulting in loss of revenues and operating costs to both parties serving electrical energy under said flat rate system at the prices charged therefor.

That in March, 1927, after a conference held between the officials of Logan City and representatives of the Utah Power & Light Company, an understanding was reached that both the plaintiff and the defendant should abandon their flat rate service in Logan City and proceed to install meters and serve their respective customers on meter rates; that thereupon the complainant, Logan City, proceeded to install meters, with the purpose in view of commencing, on September 1, 1927, to serve its patrons with electrical energy at rates based on measured service; but the defendant, Utah Power & Light Company, has since failed to install meters and continues to serve its patrons at flat rate charges for electrical energy, which are alleged by the plaintiff to be unjust, unreasonable, discriminatory, and unlawful and in violation of the provisions of the Public Utilities Act of the state of Utah.

Plaintiff prays that the defendant be required by order of the Commission to install meters and serve its customers in Logan City with electrical energy at rates charged on a basis of metered service, and for general relief.

On the 9th day of August, 1927, the defendant entered its appearance in the case and filed objections to the complaint, to the effect that the purpose of the complainant, as shown by its complaint, was not to procure reasonable rates to be charged by plaintiff and the defendant in Logan City, for electric service, but to compel the defendant to establish a schedule of rates higher than those established by plaintiff and at a resultant loss to defendant of its property and business in Logan City; that the complaint failed to show that complainant had taken the proper steps to make its metered rates legally effective under the statutes of Utah, and that the order applied for by complainant would, if granted by the Commission, deny the defendant equal protection of the law and its constitutional rights, and further, that the complaint of the complainant is insufficient. P.U.R.1928B.

cient, in that it fails to show the amount of the operating revenues, estimated or otherwise to be derived from complainant's proposed meter rates.

On August 13, 1927, certain citizens and taxpayers of Logan City filed with the Commission a petition in intervention, alleging in substance and to the effect that they as taxpayers of Logan City, for many years have been taxed large sums, to maintain the Logan City plant, and to make up the deficit caused by the complainant's operation thereof. They allege that the proposed meter rates of the complainant will, if permitted by the Commission, continue to result in a large deficit, for which they will be continually taxed for the operation of the electric plant of Logan City. They pray that the meter rates proposed to be charged by Logan City be investigated by the Commission, and, after such investigation, the Commission establish rates for Logan City that will be adequate to pay for proper and economical operation of its plant, together with the payment of interest, sinking funds, and such other proper allowances as may seem meet and proper.

On August 22, 1927, certain other citizens and taxpayers of Logan City filed a "counter" petition in intervention, they also alleging, as did the complainant, that the flat rate system of the complainant, Logan City, and the defendant, Utah Power & Light Company, is improper and proving "wasteful, extravagant, and against the public interest." These petitioners joined with the complainant in praying that the defendant be required to install meters and serve its customers on a metered basis.

On August 25, 1927, the defendant, Utah Power & Light Company, filed its answer in the case. Its answer admits that the flat rate system of charging for electric service in Logan City, is unreasonable and wasteful; but affirmatively alleges that the metered rates proposed by the complainant are equally unreasonable, low and improper. It concurs in the complaint of Logan City that flat rates should be abolished and service rendered on a meter basis, provided reasonable meter rates be established in lieu of the prevailing flat rates. It also affirmatively alleges that it is not the purpose of complainant by its proposed rates for meter service to meet the cost of operating and prop-
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erly maintaining its system, but to require the defendant, as a competitor, to establish materially higher rates for its service in Logan City, in order that complainant may acquire its business and destroy its property in Logan City; that any order of the Commission which would require the defendant to render electric service in Logan City at rates higher than those charged by Logan City, its competitor, or which would fix rates less than reasonable for service, would deprive the defendant of its property, without due process of law, and deny to it equal protection of the laws in violation of the 14th Amendment of the Constitution of the United States, and of § 7, Article 1 of the Constitution of Utah, and would further be unjust and unreasonable, and in violation of the Public Utilities Act of Utah.

It prays that the Commission investigate the matter of rates to be charged for electric service in Logan City, and fix reasonable rates to be charged therefor.

To the answer of the defendant, the complainant filed its demurrer or objections as to the sufficiency of the answer, and also its reply in effect denying the insufficiency of the proposed rates of Logan City, in view of the flat rate system being charged in Logan City.

The objections of the parties, respectively to the complaint and answer, were, after being heard and argued, taken under advisement by the Commission, to be considered, passed upon, and determined in connection with hearing and determination of the case upon its merits. The petitions of intervention of citizens and taxpayers of Logan City, were allowed.

The case came on regularly for hearing, before the Commission, at Logan City, Utah, September 15, 1927, and the hearing was concluded on the 16th day of September, 1927, when the case was taken under advisement.

From the admitted facts and the testimony taken at the hearing, the Commission finds:

1. That the complainant, Logan City, is a municipal corporation, organized and created under the laws of the state of Utah; that since about the month of May, 1904, it has owned and has been engaged in operating an electrical power plant, with transmission lines and distribution system, for the pur-

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pose of lighting its streets and public buildings and supplying, for hire, consumers with electric energy for lighting, heating, and general power purposes.

2. That complainant's present power plant or system was first constructed in 1903, at first as a hydroelectric plant, at a cost of approximately \$80,000, since when additions and betterments have been made, more especially in recent years, by rebuilding and enlarging its hydroelectric plant and the installation of a Diesel engine, and it now represents a capital expenditure of approximately \$618,000. That at the present time the complainant has an outstanding interest-bearing bonded indebtedness of \$530,000, created for and used in establishing its present power plant and distributing system.

3. That the defendant, Utah Power & Light Company, is a corporation, duly organized and existing under the laws of the state of Maine, qualified to and doing business in the state of Utah; that it is the owner of and engaged in operating a number of extensive hydroelectric interconnected generating plants and transmission and distribution systems in Utah, among which is its Logan City plant, constructed about the year 1896 on Logan river, near Logan City, Utah, by its predecessor, Hercules Power Company. That in 1896 said Hercules Power Company was granted a franchise by the complainant, Logan City, whereby it and its successors and assigns were given the right and privilege to use the streets, lanes, and alleys of Logan City for the purpose of serving citizens and residents of said city with electrical energy for heating, lighting, and general power purposes, for a term of forty years. That ever since the construction of said power plant in 1896, the defendant and its predecessors in interest have continued uninterruptedly to generate, distribute, and sell electrical energy to consumers in Logan City, for said purposes, and ever since the construction of the Logan City plant in 1903, in competition with the complainant, Logan City, generally upon a flat rate basis.

4. That the rates charged consumers of electrical energy in Logan City by the respective parties, complainant, Logan City, and defendant, Utah Power & Light Company, under said competitive situation, for several years last past and at the time P.U.R.1928B.

of the filing of the complaint herein, were for the most part identical and based upon the following schedules, respectively:

Utah Power & Light Company

Power: One dollar and fifty cents per connected horse power per month.

Lighting: Ten cents per month for a 40-watt lamp and larger lamps in direct proportion—continuous burning.

Fuel: Grills—500 watts—50 cents per month. Air heaters, 20 cents per ampere per month. Vacuums, washers, motors, etc., 25 cents per month. Ranges, 3 cents per kilowatt hour (metered).

Logan City, A Municipal Corporation

Power: One dollar and fifty cents per connected horse power per month.

Lighting: Ten cents per month for a 40-watt lamp and larger lamps in direct proportion—continuous burning.

Fuel: Grills—500 watts—25 cents per month. Air heaters, 20 cents per ampere per month. Vacuums, washers, motors, etc., 25 cents per month. Ranges, 3 cents per kilowatt hour (metered).

5. That for many years prior to March, 1925, Logan City had been charging consumers under said flat rate system for a 40-watt lamp, 15 cents; the Utah Power & Light Company, 10 cents. That the flat rates charged both before and since said rate reduction proved inadequate in varying amounts from year to year to meet the necessary operating expenses of complainant's, Logan City, plant, interest, and the principal of its bonded indebtedness, created for the construction of its power system, said flat rates having also proved wasteful, by reason of consumers using more power than needed.

6. That more especially for the last three years, in order to meet the deficit created in the operation of the Logan City plant, and in meeting payments on bonded indebtedness for the plant, complainant, under said flat rate system of charging for electrical energy, has had to tax the property owners in Logan City approximately twenty-five thousand dollars each year, the larger

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portion of which has been borne by about six hundred taxpayers of Logan City, among whom are included the protesting citizens and taxpayers herein.

7. That on the 11th day of January, 1927, the City Commissioners of Logan City passed a resolution to the effect that Logan City could no longer continue to operate its electric power plant and serve its customers for the flat rates then being charged; that it would install meters and charge its customers for electric service upon a meter basis, and at the following rates, to become effective, September 1, 1927:

5 cents per kilowatt hour for first 50 kilowatt hours consumed per month.

4 cents per kilowatt hour for next 150 kilowatt hours consumed per month.

3 cents per kilowatt hour for all electricity used over and above 200 kilowatt hours per month, for lighting purposes.

Minimum rate, 50 cents per month.

10 per cent discount to be allowed on prompt payments.

General Heating and Cooking Meter Rate

2 cents per kilowatt hour for all monthly consumption.

5 per cent discount to be allowed for prompt payment.

General Power Meter Rate

5 cents per kilowatt hour for first 30 kilowatt hours.

4 cents per kilowatt hour for next 90 kilowatt hours.

3 cents per kilowatt hour for next 270 kilowatt hours.

2 cents per kilowatt hour for next 810 kilowatt hours.

1 cent per kilowatt hour for all in excess of 1200 kilowatt hours each monthly consumption.

Minimum monthly charge per month per contract horse power, \$1.

5 per cent discount for prompt payment, if paid within discount period.

Said resolution further authorized the mayor of Logan City to enter into contracts with consumers at said rates, which said contract, among other things, provided:

"It is the aim and purpose of the parties hereto, that all users of electric energy within Logan City shall receive and

pay for the same on meter rates; and to this end the city agrees, if necessary, to apply to the State Utilities Commission or to the supreme court for an order directing and requiring the Utah Power & Light Company to comply with the statute in this regard and to serve its patrons in this city on the same uniform meter rates as said company now serves and provides its patrons outside of Logan City."

7-A. That on the 7th day of April, 1927, the defendant, Utah Power & Light Company met with the City Commissioners of Logan City in the city offices of Logan City, Utah, and then and there, informed the City Commission that the defendant would voluntarily abandon its said "flat" rate system then and theretofore maintained in Logan City, Utah, and would proceed to install meters preparatory to serving its customers in Logan City on meter rates, at the same time as complainant would commence serving its customers on meter rates, at a date to be fixed by the complainant, Logan City; that on the 22nd day of April, 1927, in pursuance to said understanding the City Commissioners of Logan City passed a resolution to the effect that it would proceed to serve its patrons under a metered system on and after September 1, 1927.

8. That, generally speaking, in the same territory the uniform meter rates now charged for electric service in Utah by the defendant, Utah Power & Light Company, outside of Logan City, are as follows:

RESIDENTIAL AND COMMERCIAL LIGHTING—METER RATE

Charges

10 cents per kilowatt hour first 250 kilowatt hours of monthly consumption.

9 cents per kilowatt hour next 250 kilowatt hours of monthly consumption.

8 cents per kilowatt hour next 250 kilowatt hours of monthly consumption.

7 cents per kilowatt hour next 250 kilowatt hours of monthly consumption.

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6 cents per kilowatt hour next 250 kilowatt hours of monthly consumption.

5 cents per kilowatt hour for all kilowatt hours of monthly consumption in excess of 1250 kilowatt hours.

GENERAL HEATING AND COOKING—METER RATE

Charges

3 cents per kilowatt hour for all monthly consumption.

Commercial Heating and Cooking—Meter Rate

Charges

(a) Demand: \$1 per month per kilowatt of monthly maximum demand which charge includes thirty hours' use per month for each kilowatt of monthly maximum demand.

(b) Energy: For all energy used in excess of that included in the above as follows: 3 cents per kilowatt hour for the next 90 hours' use per month of monthly maximum demand. $\frac{3}{4}$ cent per kilowatt hour all monthly consumption in excess of one hundred twenty hours' use per month of monthly maximum demand.

General Power—Optional Meter Rate—Low Voltage

Charges

8 cents per kilowatt hour for the first 30 kilowatt hours used per month per contract horse power.

7 cents per kilowatt hour for the next 50 kilowatt hours of monthly consumption.

$5\frac{1}{2}$ cents per kilowatt hour for the next 200 kilowatt hours of monthly consumption.

4 cents per kilowatt hour for the next 800 kilowatt hours of monthly consumption.

$1\frac{3}{4}$ cents per kilowatt hour for all excess monthly consumption.

Minimum Monthly Charges

\$2.25 gross per month for the first contract horse power.

\$1.50 gross per month per contract horse power for each additional contract horse power.

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*Residential Lighting and Cooking—Meter Rate**Net Charges*

\$2 per month for four rooms or less, including 28 kilowatt hours.

35 cents per month for each additional room, including 5 kilowatt hours per room.

2 $\frac{3}{4}$ cents per kilowatt hour for all excess.

*Residential Lighting and Refrigeration—Meter Rate**Net Charges*

\$2 per month for four rooms or less, including 28 kilowatt hours.

35 cents per month for each additional room, including 5 kilowatt hours per room.

4.5 cents per kilowatt hour for all excess.

*Residential Lighting, Refrigeration and Cooking—Meter Rate**Net Charges*

\$3 per month for four rooms or less, including 42 kilowatt hours.

35 cents per month for each additional room, including 5 kilowatt hours per room.

2 $\frac{3}{4}$ cents per kilowatt hour for all excess.

*Residential Lighting, Cooking and Water Heating—Meter Rate**Net Charges*

\$3.50 per month for four rooms or less, including 49 kilowatt hours.

35 cents per month for each additional room, including 5 kilowatt hours per room.

2 $\frac{3}{4}$ cents for the next 150 kilowatt hours per month.

2 $\frac{3}{4}$ cents per kilowatt hour for all excess.

*Residential Lighting, Cooking, Refrigeration and Water Heating—Meter Rate**Net Charges*

\$4 per month for four rooms or less, including 56 kilowatt hours.

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35 cents per month for each additional room, including 5 kilowatt hours per room.

2 $\frac{3}{4}$ cents for the next 150 kilowatt hours per month.

2 $\frac{1}{4}$ cents per kilowatt hour for all excess.

General Power—Meter Rate

Low Voltage—1 horse power to 50 horse power

Charges

(a) Demand: \$2.50 per month per contract horse power, which charge entitles consumer to use during said month 30 kilowatt hours for each horse power of contract power.

(b) Energy: 7.5 cents per kilowatt hour for next 50 kilowatt hours of monthly consumption.

5.5 cents per kilowatt hour for next 250 kilowatt hours of monthly consumption.

3.5 cents per kilowatt hour for next 750 kilowatt hours of monthly consumption.

1.2 cents per kilowatt hour for all excess monthly consumption.

General Power—Meter Rate

Low Voltage—50 horse power or over.

Charges

(a) Demand: \$2.50 per month per contract horse power, which charge entitles consumer to use during such month 35 kilowatt hours for each horse power of contract power.

(b) Energy: 7 cents per kilowatt hour for next 50 kilowatt hours of monthly consumption.

5 cents per kilowatt hour for next 250 kilowatt hours of monthly consumption.

3 cents per kilowatt hour for next 750 kilowatt hours of monthly consumption.

1 cent per kilowatt hour for all excess monthly consumption.

The foregoing schedules are for alternating current service supplied at 110, 220, and 440 volts.

9. That Logan City, with a population of approximately P.U.R.1928B.

10,000 people, had, as of September 1, 1927, 3361 consumers of electric energy, including the street lighting of Logan City,—when classified as follows:

Residential lighting	2600
Commercial lighting	324
Residential fuel	336
Commercial fuel	14
Power	86
Street lighting	1
	<hr/> 3361

10. That the relative number of customers and the estimated yearly kilowatt hour consumption in Logan City of the 3361 consumers of electric energy purchased of the complainant and the defendant, respectively, was, as of September 1, 1927, as follows:

Classification.	U. P. & L. Co. No. of Customers.	Logan City No. of Customers.	Total No. of Customers.	Estimated K.W.H. per Customer.
Residence light	1046	1554	2600	245
Commercial light	181	143	324	1500
Residence fuel	250	86	336	1046
Commercial fuel	14	..	14	3312
Power	50	36	86	...
Street lighting .....	..	1	1	...

11. That the estimated yearly revenues based on the number of customers of the Logan City plant, as of September 1, 1927, and its proposed meter rates, to become effective as of September 1, 1927, would be as follows:

Classification.	No. of Customers.	Total Billing per Customer.	Possible Discount.	Total Minimum Net Revenue.
Residence light	1554	\$12.25	\$1.22	\$17,140.62
Commercial light	143	66.00	6.60	8,494.20
Residence fuel	86	20.80	1.04	1,699.36
Commercial fuel .....	..	.....	.....	.....
Power	36	175.00	8.75	5,985.00
Street lighting	1	8,500.00	....	8,500.00
Total				<hr/> \$41,819.18

12. It is estimated that the yearly operating expenses of complainant's, Logan City, power plant, including distribution system, will be approximately \$37,642.16, allowing nothing on power plant values for depreciation nor for interest on bonded indebtedness, nor to meet any contingencies that may arise. ALP.U.R.1928B.

lowing 5 per cent for depreciation on power plant values alone, \$420,000, an additional expense would be incurred of \$21,000.

The foregoing findings of fact the Commission believes to be as conservatively and fairly found and stated as is possible to do, in view of the conflicting testimony of witnesses who testified in this case and who are shown to be experienced and familiar with the management of public utilities, both privately and municipally owned and operated.

Throughout the hearing and investigation of this case, the complainant has contended that the Public Utilities Commission has had no jurisdiction to receive testimony bearing upon the question of the reasonableness of the rates of its Logan City plant, as fixed and determined by the City Commissioners of Logan City, while at the same time it has contended that it is the duty of the Utilities Commission under the provisions of the Public Utilities Act to require the defendant to serve its customers at reasonable rates, to be fixed and determined by us, upon a metered basis.

As the record herein shows, the complainant, on the 1st day of September, 1927, proceeded to serve its customers in Logan City upon a metered basis, at rates fixed and determined by the City Commissioners. These rates are challenged, not only by the defendant but also on the part and in behalf of a large number of citizens and heavy taxpayers of Logan City, as being insufficient to meet the financial requirements of the Logan City plant. They contended that the rates sought to be now charged by complainant under its metered system, are equally unjust and unreasonable, if not more so, than were the uniform flat rates charged by complainant and the defendant in recent years, which resulted in operating losses, to be borne, necessarily, on the one hand by the taxpayers of Logan City and on the other hand by the ratepayers generally of the Utah Power & Light Company.

[1] That the Public Utilities Commission is charged with the duty of regulating the practices, rates, and charges of municipally owned as well as privately owned public utilities operating for hire in this state, is so clearly expressed in the provisions of our Public Utilities Act and so explicitly confirmed P.U.R.1928B.

by our supreme court decisions, that it would seem the position taken by Logan City with respect to its City Commissioners having the right to arbitrarily fix and maintain rates after their reasonableness has been challenged in proper proceedings under the Public Utilities Act, irrespective of any action taken on the part of the Utilities Commission, is hardly worthy of of even passing notice. However, the question has been here again raised, and we will, before proceeding to discuss and rule upon the merits of this case, point out the more pertinent provisions of our statute or act that are, as we believe, absolutely controlling.

Section 4782, Compiled Laws of Utah, 1917, provides:

"3. The term 'corporation,' when used in this title, includes a corporation, an association, a municipal corporation, and a joint stock company, having any powers or privileges not possessed by individuals or partnerships.

"4. The term 'municipal corporation,' when used in this title, shall include all cities, counties, or towns, or other governmental units created or organized under any general or special law of this state."

"19. The term 'electric plant,' when used in this title, includes all real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of electricity for light, heat, or power, and all conduits, ducts, or other devices, materials, apparatus, or property for containing, holding, or carrying conductors used or to be used for the transmission of electricity for light, heat, or power.

"20. The term 'electrical corporation,' when used in this title, includes every corporation or person, their lessees, receivers, or trustees appointed by any court whatsoever, owning, controlling, operating, or managing any electric plant, or in anywise furnishing electric power for public use within this state, except where electricity is generated on or distributed by the producer through private property alone, solely for his own use or the use of his tenants and not for sale to others."

"28. The term 'public utility,' when used in this title, includes every common carrier, gas corporation, automobile corporation.

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poration, electric corporation, telephone corporation, telegraph corporation, water corporation, heat corporation, and warehouseman where the service is performed for or the commodity delivered to the public or any portion thereof. The term 'public or any portion thereof,' as herein used, means the public generally, or any limited portion of the public including a person, private corporation, municipality, or other political subdivision of the state, to which the service is performed or to which the commodity is delivered, and whenever any common carrier, gas corporation, automobile corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, heat corporation, or warehouseman performs a service or delivers a commodity to the public or any portion thereof for which any compensation or payment whatsoever is received, such common carrier, gas corporation, automobile corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, heat corporation, and warehouseman is hereby declared to be a public utility subject to the jurisdiction and regulation of the Commission and the provision of this title. Furthermore, when any person or corporation performs any such service or delivers any such commodity to any public utility herein defined, such person or corporation and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction and regulation of the Commission, and to the provisions of this title. Any corporation or person not being engaged in business exclusively as a 'public utility,' as hereinbefore defined, shall be governed by the provisions of this title in respect only of the 'public utility' or 'public utilities' owned, controlled, operated, or managed by it or by him, and not in respect of any other business or pursuit."

Section 4783:

"1. All charges made, demanded, or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge made, demanded, or received for such product or commodity or service is hereby prohibited and declared unlawful.

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"2. Every public utility shall furnish, provide, and maintain such service, instrumentalities, equipment, and facilities as shall promote the safety, health, comfort, and convenience of its patrons, employees, and the public and shall be in all respects adequate, **efficient**, just and reasonable."

Section 4784:

"2. Under such rules and regulations as the Commission may prescribe, every public utility other than a common carrier shall file with the Commission within such time and in such form as the Commission may designate, and shall print and keep open to public inspection schedules showing all rates, tolls, rentals, charges, and classifications collected or enforced, or to be collected or enforced, together with all rules, regulations, contracts, privileges, and facilities which in any manner affect or relate to rates, tolls, rentals, charges, classifications, or service. Nothing in this section contained shall prevent the Commission from approving or fixing rates, tolls, rentals, or charges, from time to time, in excess of or less than those shown by said schedule.

"3. The Commission shall have power, from time to time, in its discretion, to determine and prescribe by order such changes in the form of the schedules referred to in this section as it may find expedient, and to modify the requirements of any of its orders, rules, or regulations in respect to any matters in this section referred to."

Section 4789:

"No public utility shall establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. The Commission shall have the power to determine any question of fact arising under this section."

Section 4798:

"Jurisdiction. The Commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in this state, as defined in this title, and to supervise all of the business of every such public utility in this state, and to do all things whether herein specifically designated, or in addition P.U.R.1928B.

thereto, which are necessary or convenient in the exercise of such power and jurisdiction."

Section 4800:

"Commission may make classification and fix rates. 1. Whenever the Commission shall find after hearing that the rates, fares, tolls, rentals, charges, or classifications, or any of them demanded, observed, charged, or collected by any public utility for any service or product or commodity, or in connection therewith, including the rates or fares for excursion or commutation tickets, or that the rules, regulations, practices, or contracts, or any of them, affecting such rates, fares, tolls, rentals, charges, or classifications, or any of them, are unjust, unreasonable, discriminatory, or preferential, or in anywise in violation of any provisions of law, or that such rates, fares, tolls, rentals, charges, or classifications are insufficient, the Commission shall determine the just, reasonable, or sufficient rates, fares, tolls, rentals, charges, classifications, rules, regulations, practices, or contracts to be thereafter observed and in force, and shall fix the same by order as hereinafter provided.

"2. The Commission shall have the power to investigate a single rate, fare, toll, rental, charge, classification, rule, regulation, contract, or practice, or any number thereof, or the entire schedule or schedules of rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts, and practices, or any number thereof, of any public utility, and to establish, after hearing, new rates, fares, tolls, rentals, charges, classifications, rules, regulations, contracts, or practices, or schedule or schedules, in lieu thereof."

In the case of *St. George v. Public Utilities Commission*, 62 Utah, 453, P.U.R.1924B, 550, 558, 220 Pac. 720, where the question was raised, our own supreme court said:

"Municipal corporations, in express terms, are included in the act and they are there treated precisely the same as all other corporations or persons that are affected or controlled by the act."

But, says the complainant, since the *St. George* case, *supra*, was under consideration and decided, our legislature passed an P.U.R.1928B.

act amending § 794, Compiled Laws of Utah, 1917, as amended by Chapter 19, Session Laws of Utah, 1921, and this act, Chapter 63, Laws of Utah, 1925, by implication at least repealed the provisions of the Public Utilities Act, above quoted, with respect to the Utilities Commission having jurisdiction over rates and charges of public utilities, municipally owned and operated, and moreover, conferred jurisdiction upon their local authorities to establish such rates as they might deem proper and advisable.

The statute relied upon by complainant, as amended, reads:

"The Board of Commissioners, city council, or board of trustees, as the case may be, shall provide by ordinance for the issuance and disposal of such bonds, provided that no such bonds shall be sold for less than their face value. The Board of Commissioners, city council, or board of trustees, as the case may be, shall annually levy a sufficient tax to pay the interest on such indebtedness as it falls due and also to constitute a sinking fund for the payment of the principal thereof within the time for which such bonds are issued; provided that whenever bonds shall have been issued for the purpose of supplying any city or town with artificial light, water or other public utility, the rate or charges from the operation of the system or plant constructed from the proceeds of such bonds may be made sufficient to meet such payments, in addition to operating and maintenance expenses, and taxes shall be levied to meet any deficiencies. Water or sewer bonds may be issued for a term not exceeding forty years. All other bonds may be issued for a period not exceeding twenty years. Such bonds may be either serial or term bonds."

There is not a word in the statute relied upon by complainant, as we read it, that refers to the regulatory powers of the Public Utilities Commission, much less expressly or by implication confers upon municipal authorities the power to fix rates for public utility service. Of course, it provides for the issuance and disposal of bonds and confers certain taxing powers upon the city authorities, matters which, by any stretch of imagination, cannot be construed as having to do with the P.U.R.1928B.

determination of rates applicable to the service of a public utility.

It should be kept in mind, in this connection, that the right to regulate rates and change them from time to time, as the public welfare may demand, is essentially a police power, an inherent element of sovereignty that is never delegated or surrendered by the state by implication, but only upon terms that are so clearly expressed that there can be no doubt. This doctrine, we think, is so firmly established and thoroughly understood in this state, after the many pronouncements of our supreme court, that citations of court decisions here would subserve no good purpose whatever.

[2] The objections, therefore, of the complainant to the jurisdiction of the Commission to rule and pass upon the reasonableness of the rates as sought to be established by its City Commissioners, cannot be sustained. Further, without going into detail, the several objections and motions of the respective parties to the pleadings and to the taking of testimony before the Commission in the course of the proceedings herein, we think should be, and the same are, in so far as they are not sustained by our conclusions herein, hereby overruled and denied. Rules of pleading and practice and the technical rules of evidence that are to be observed by the trial courts, do not apply to hearings before the Utilities Commission. (§ 4820, Chapter 5, Compiled Laws of Utah, 1917.)

[3] Coming now more directly to the consideration of this case upon its merits, it should never be lost sight of that the Public Utilities Commission is a fact-finding body, made so by statute, and, therefore, its findings and conclusions must be predicated upon the evidence in the record, regardless of what might otherwise be the views or inclinations of its individual members. Further, it should be kept in mind, as a matter of law, that when a city or other municipal corporation goes into a commercial business, and the maintenance and operation of an electric plant for furnishing electric energy for hire affords an apt illustration, it takes upon itself the character of the ordinary commercial concern, and to that extent ceases to function in its governmental capacity, that is to say, just to the extent P.U.R.1928B.

it engages in a commercial enterprise or business, it acts in a proprietary capacity as distinguished from a governmental one. Such we believe to be the generally accepted doctrine, as promulgated by the American courts, state and Federal, throughout the country.

[4] In the consideration of this case upon its merits, we are met at the threshold with a competitive situation. It appears that Logan City has two power plants, either one of which is capable of serving the present needs of consumers of electric energy, efficiently and well, one privately, the other municipally owned and operated. The privately owned plant of the defendant was first in point of time. Whether its service charges, to begin with, were so excessive or its service so inefficient as to justify the complainant, Logan City, in constructing a power plant to be municipally owned and operated as a commercial enterprise, in competition with the defendant's privately owned plant, we need not express an opinion. Anyway, it must be conceded that the complainant had a lawful, legal right to construct and operate a power plant in competition with the defendant's, and it still has the right to continue to do so. The difficult task lies in determining the proper rates to be established in view of the competitive situation that is presented and the infallibly economic laws that are insurmountable in all such cases. However, it is admitted that the flat rate service heretofore rendered in Logan City by the public utilities now under consideration, has proven wasteful and resulted in heavy losses of operating revenues to both parties. For years the taxpaying citizens of Logan City have been heavily assessed and taxed, to meet the maintenance and operating requirements of the complainant's, Logan City, power plant. That so long as these taxpayers will be required to continue to pay taxes in Logan City to maintain and operate the complainant's plant, in order that its patrons may be served with electric energy below cost to it, the rates of complainant will remain unjust, unreasonable, and in violation of law. Consumers of electric energy have neither moral nor legal right to be served at unreasonable rates by a public utility, it matters not whether it be municipally or privately owned. The intervening taxpayers of Logan City, who in P.U.R.1928B.

this case pray that the reasonableness of the proposed meter rates as adopted by the City Commissioners of Logan City be investigated, and, if found unreasonable, that just and reasonable rates be established as near as may be and as the laws of this state require, are justly entitled to the consideration they ask. The equities of this case are with them.

In all fairness to the mayor and the city commissioners of Logan City, it should be here said that they have placed themselves on record in this case as desiring complainant's, Logan City, power plant rates to be sufficiently high to make its plant self-sustaining. With that in mind, they passed the resolution providing for the abandonment of the flat rate system of charging on the part of the city plant. They further sought to provide by their resolution that from and after September 1, 1927, the city plant should proceed to serve its patrons not only on a meter basis, but at fixed rates which they conceived to be, and now contend are, adequate to meet the plant's financial requirements, provided, of course, it receives all the patronage of consumers of electric energy in Logan City.

Expert witnesses, testifying in this case, who were shown to be schooled and experienced in the management and the revenues ordinarily to be earned in the operation of electric power plants under quite similar conditions and circumstances and that are fairly comparable with the complainant's plant, do not lend much support to the complainant's contention that its rates as proposed would prove sufficient to earn the revenues required to make its plant self-supporting. Although the estimates of these witnesses were somewhat at variance with each other, with respect to what the earnings of the complainant's plant might be if it gets all of the business, not one of them agreed with the complainant's contention that it would even then be self-supporting, after taking into consideration all the factors that must necessarily enter into every just and reasonable rate base.

Moreover, we have no right to assume, in the face of this record and the facts it discloses, that the complainant is to be the recipient of all the patronage for electric service in Logan City. For years the patronage has been and is now about evenly divided between the complainant and the defendant. Consumers P.U.R.1928B.

of electric energy have a perfect right, under competitive situations, to choose their own competitor. If we are to indulge in presumptions rather than facts in the consideration of this case, then we prefer to indulge in the presumption that consumers of power will do as they always have done in Logan City, choose and patronize whichever plant they please.

[5] Under the express provisions of our Public Utilities Act, we are enjoined to establish just and reasonable rates for a public utility in all cases where the reasonableness of its rates are brought into question and are shown to be otherwise. Section 4800, before quoted, directs that "Whenever the Commission shall find after hearing that the rates . . . charged or collected by any public utility for any service . . . are insufficient, the Commission shall determine the . . . sufficient rates . . . charges . . . or contracts to be thereafter observed and in force, and shall fix the same by order as hereinafter provided."

[6] The rates as fixed and determined for the complainant's power plant by the City Commission are clearly shown by the evidence in the record of this case to be insufficient even to meet what the complainant concedes to be the financial requirements of its power plant. The flat rates continued to be charged by the defendant likewise are shown to be insufficient and unreasonable and a burden not only upon itself but discriminatory as to its ratepayers generally throughout the state.

The reasonableness of the rates uniformly charged consumers throughout the state on a meter basis by the defendant for electric service, as set forth in our findings herein, are not challenged in these proceedings. No good reason in our judgment has been nor can be assigned at this time why these rates, on a metered basis, should not be made applicable to the service of both the complainant and the defendant in Logan City, and the defendant required to cease serving upon a flat rate basis. Under such rates and system of charging, the results cannot be guaranteed but must of necessity remain somewhat problematical, in view not only of the competitive situation which exists in Logan City, but because the record here does not in any satisfactory degree show what the consumption of electrical en-

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ergy may be in Logan City under a meter system. Until the flat rate system is abandoned and the metered system of serving consumers is adopted in Logan City by both parties, the consumption of electric energy will remain as it is, largely a matter of conjecture.

As to which of these competing public utilities may receive the greater patronage under a metered system of charging, that is a matter to be more properly taken care of by their selling agents, and with which this Commission should not be concerned.

With respect to the provisions of the public utility laws of the state, the utilities now under consideration are to them, as we believe, amenable alike.

Therefore, for the present, at least, under the facts found in this case, we think they should be placed on equal footing, both as to the matter of their charges and as to rules applicable to service. Further, by reason of the competitive situation and the uncertainty of consumption which exists in Logan City, we feel that the orders of the Public Utilities Commission herein with respect to rates for electric service should not be at this time made permanent, nor so regarded by any interested party, but as merely temporary and for a test period of one year, only. If at the end of the one-year period it has been demonstrated and a proper showing is made by either party that it is capable, under the laws of the state, of serving consumers of electric energy in Logan City at lower rates than those which are now thought to be just and reasonable under present conditions, it may be expected the Utilities Commission will make further findings and enter its order in accordance therewith. Meanwhile, both the complainant and the defendant should be required to keep accurate books of account and report with respect to public utility affairs, in accordance with the rules of this Commission.

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WISCONSIN RAILROAD COMMISSION.

RE WISCONSIN TELEPHONE COMPANY.

[U-3090.]

Commission — Duty to be bound by decision of superior tribunals — Character of Commission.

1. The Commission is an administrative body charged with the carrying out of the provisions of the law, and is bound by the authoritative interpretations of the state and national supreme courts, p. 435.

Valuation — Measures of value — Book value — Decisions of superior courts.

2. An order of the Commission in a rate proceeding using a rate base predicated upon book value must be modified to conform to the law laid down by the United States and state supreme courts requiring valuation of utility property for a rate proceeding to be substantially based upon present-day prices, p. 435.

Valuation — Ascertainment for rate making — Reproduction cost less depreciation — Decision of superior court.

3. A Commission, in ascertaining valuation of utility property for purposes of rate making, must determine the extent of the depreciation in the property, when the depreciated reproduction value on a present price basis must be given material weight in fixing fair value, p. 436.

Depreciation — Straight-line method.

4. Annual depreciation* should be determined by the straight-line method where the rate base has been obtained through the depreciated value of the property, p. 437.

Depreciation — Consumers' credit for excess accumulation — Telephone.

5. Subscribers of a telephone utility were held to be entitled to a credit of 5 per cent per annum on an excess accumulation of a depreciation reserve, p. 438.

[November 5, 1927.]

APPLICATION of a telephone utility for authority to increase rates; former order of Commission authorizing increase modified to conform with subsequent decision of the state supreme court and additional increase of rates allowed.

By the **Commission**: An order in this case was issued by the Commission on October 30, 1926. On February 17, 1927 the company petitioned for a rehearing in the case on the grounds that the rate base used by the Commission in said decision and order was substantially too low and was not consistent with the proofs adduced in the matter and furthermore was contrary to P.U.R.1928B.

the principles enunciated by the supreme court of the state of Wisconsin in the case of the Waukesha Gas & E. Co. v. Railroad Commission, 181 Wis. 281, P.U.R.1923E, 634, 194 N. W. 846; see also 191 Wis. 565, P.U.R.1927B, 545, 211 N. W. 760.

Rehearing in the case was granted and was held in Green Bay on June 1, 1927 at which Miller, Mack & Fairchild, by Edwin S. Mack, and J. F. Krizek appeared for the Wisconsin Telephone Company; J. H. McGillan, Mayor, Thomas C. Dwyer, City Attorney, and W. L. Evans, Special Counsel, appeared for the city of Green Bay, and J. Malia appeared for the Green Bay Association of Commerce.

At the rehearing the company offered no additional evidence and requested that the Commission reconsider the case on the evidence previously submitted, exception being taken to the rate base used in the previous order.

In the previous decision in this case the Commission discussed at some length, largely by quotations from an earlier decision, its view of the requirements of the law relative to the basis for valuation and stated that "We are disposed to give the prudent investment basis, which means original cost wisely and economically made, as much weight in fixing value in rate cases as is permissible under the law." We further stated, "In this particular case we feel that inasmuch as telephone rates for all other exchanges of the Wisconsin Telephone Company have been determined upon the basis of the book values of the exchange properties, there would be discrimination against the telephone users in the city of Green Bay were a different basis adopted."

[1, 2] The views of the Commission as quoted above represent its present opinion. However, since October 30, 1926, the Wisconsin supreme court in the Waukesha Gas & Electric Company case, *supra*, has stated in substance that it is doubtful if any valuation not substantially based upon present-day prices would meet the rule of valuation laid down in decisions of the United States Supreme Court, with special reference to the rulings in the Indianapolis Water Company case, 272 U. S. 400, 71 L. ed. 154, P.U.R.1927A, 15, 47 Sup. Ct. Rep. 144. Our order in the Waukesha case was reversed by the Wisconsin P.U.R.1928B.

supreme court, *supra*, on the grounds that insufficient weight had been given to present reproduction costs.

As the Commission is an administrative body charged with carrying out the provisions of the law and is bound by the authoritative interpretations of the state and national supreme courts there can be no question that the rate base used in our previous order, which was the book value, must be modified to conform to the law as stated in the Indianapolis Water Company and the Waukesha Gas & Electric Company cases, *supra*.

[3] At the time of the previous decision the Commission made no effort to determine the depreciated value of the property as the matter was not material in that case where the original cost was accepted as the rate base and the allowance for depreciation was computed under the sinking-fund method. With the recent rulings of the Supreme Court, however, it now becomes necessary that we determine the extent of the depreciation in the property as the depreciated reproduction value on a present price basis must be given material weight in fixing the fair value of the property.

In order to do this we have had our engineering staff make a thorough inspection of the various classes of property, in so far as it was practicable to do so, and assign to each class of property a condition per cent based upon representative inspections made at random throughout the system. Where it was impossible or impracticable to inspect a representative portion of any class of property, such as underground conduit and underground cable, the condition per cent was arrived at by giving consideration to the inspections made and a study of the composite age and probable life of each class. The result of the engineers' investigation has been applied to their valuation as shown in the previous decision except that a correction of \$5,500 has been made to that valuation to cover an omission for butt treatment of poles. The following table shows the revised valuation:

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	Present Day Cost Basis.	
	Cost New.	Less Depreciation.
Central office land	\$20,976	\$20,976
Other land	5,192	5,192
Poles and wire supports	100,799	77,031
Aerial wire	64,221	49,097
Aerial cable	111,894	87,031
Underground conduit	98,209	99,647
Underground cable	131,615	124,508
Substation equipment	145,038	108,778
Exchange buildings	64,652	61,419
Miscellaneous buildings	45,848	45,273
Central office equipment	224,426	179,541
Utility equipment	4,411	3,308
General office equipment	1,276	957
Miscellaneous equipment	17,327	12,995
Paving	7,000	6,461
Total above items	\$1,042,884	\$873,214
Overhead allowance	156,433	130,982
Total	\$1,199,317	\$1,004,196

The above valuation was made upon a present price basis from an inventory that has been accepted by both the company and the city of Green Bay and we feel is as fair a valuation as can be made. Considering the other elements of value to be used in determining the fair value of the property, but giving principal weight to the present reproduction value as required by the courts, and allowing a reasonable amount for going value, we find the fair value of the property to be used as a rate base to be \$1,050,000. An allowance of 7 per cent of this value for return we believe is reasonable and will be provided for in this case.

The only other question involved in this case is the allowance for depreciation as no exception has been taken by either side to the operating expenses as used in the previous case.

[4] In the former case we computed our allowance for depreciation on the original investment value using a 5 per cent sinking-fund method. In the present case where we have used the depreciated value of the property as a rate base it is necessary that we use the straight-line method of computing the allowance for depreciation. The following table shows our method of computing this allowance which has been based upon our engineers' cost of reproduction new value and the lives and salvage values as used in the previous case with some modifications to give effect to increased service lives for certain classes of P.U.R.1928B.

property which our engineers' inspections indicated should be made.

	Value.	Rate.	Amount.
Central office land	\$20,976	0	
Other land	5,192	0	
Poles and wire supports	100,799	.0570	\$5,746
Aerial wire	64,221	.0869	5,581
Aerial cable	111,894	.0522	5,841
Underground conduit	98,209	.0200	1,964
Underground cable	131,615	.0375	4,936
Substation equipment	145,038	.0408	5,918
Exchange buildings	64,652	.0200	1,293
Miscellaneous buildings	45,848	.0200	917
Central office equipment	224,426	.0529	11,872
Utility equipment	4,411	.2125	937
General office equipment	1,276	.0636	81
Miscellaneous equipment	17,327	.1667	2,888
Paving	7,000	0	
Total above items	\$1,042,884	-	\$47,974
Overhead allowance	156,433		7,196
	\$1,199,317	.0460	\$55,170

[5] The allowance for depreciation as above computed amounts to \$55,170. However, this amount should be reduced by an interest credit on the excess depreciation reserve that has been collected from the Green Bay subscribers in the past. On December 31, 1924 the company had accumulated a depreciation reserve of \$279,691 whereas our valuation indicates a requirement of only \$195,121. The Green Bay subscribers are entitled to a credit of 5 per cent per annum on the excess accumulation of \$84,570 which amounts to \$4,228.50 leaving \$50,941.50 as the net valuation for depreciation. This amount, together with our allowance of \$73,500 for return makes a total annual requirement of \$124,441.50 for depreciation and return that must be provided in rates.

The balance available for these purposes under the old rates, as shown on page 14 of our previous decision, was \$80,135.87 which is \$44,305.63 short of a full return. The increase in rates necessary to produce this increase in net income after deducting taxes is approximately \$48,000. The rates authorized in our previous order provided about \$40,100 of increased revenue so that an additional increase of about \$7,900 must be made at this time.

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WISCONSIN RAILROAD COMMISSION.

RE AUTO TRANSPORTATION COMPANY APPLICATIONS.

[BC-52A et al.]

Rates — Reasonableness of rates charged prior to regulation — Motor utility.

1. Rates which have been established and actually applied to traffic by various operators prior to regulation by the Commission are prima facie reasonable, but this presumption should not prevail even in the absence of other testimony where the rates are manifestly unreasonable, p. 447.

Certificates of convenience and necessity — Operation prior to regulation — Liberal statutory construction.

2. It was believed that the intention of the legislature in seeking to prevent any unfairness incident to the establishment of motor transportation regulation by providing that operators lawfully functioning under a certificate on a set date should be entitled to authorization would be carried out by construing such laws with great liberality, and certificates were accordingly granted to applicants established and actually operating on such a date, although through ignorance of the law they were in fact not formally authorized at that time, p. 447.

Certificates of convenience and necessity — Conditions — Consent of municipality.

3. A statute (§ 194.11 subsec. 2) providing that no auto transportation company shall operate within or through any municipality without Commission consent does not impose any condition precedent upon the issuance of a certificate by the Commission but only upon operation under such certificate, p. 448.

Automobiles — Insurance policy — Conditions approved.

4. The ordinary public liability form of insurance policy assuring the payment of damages to persons was temporarily permitted to be filed as satisfying the demands of a statute (§ 194.14) requiring auto transportation companies engaged in the carriage of freight to file insurance, in the absence of any express determination of the character of policy intended by the law, p. 449.

Public utilities — Regulation of common carriage by automobiles.

Discussion of the evolution of regulation by the state of common carriage by automobiles, p. 444.

Service — Comparisons of service by rail and automobiles.

Discussion of the relative advantages and relative costs of transportation service by rail and automobiles, p. 445.

[December 19, 1927.]

P.U.R.1928B.

APPLICATIONS of various operators of motor carriers for certificates of convenience and necessity for the carriage of freight in the state of Wisconsin; granted in accordance with opinion.

By the **Commission**: The Commission has received from various applicants applications for certificates to operate as auto transportation companies for the carriage of freight over various routes throughout the state. These applications were heard separately at public hearings and were considered separately by the Commission, but for the sake of convenience they are disposed of in this decision and order, except those which require special consideration and separate treatment, and those applications for certificates covering operation which had not actually commenced prior to the passage of Chapter 395, Laws of 1927. Public hearings in these matters were held at:

Green Bay, October 8, 1927; Milwaukee, October 14, 1927; Madison, October 17, 1927; Portage, October 18, 1927; Darlington, October 21, 1927; La Crosse, October 25, 1927; Eau Claire, October 27, 1927; Superior, October 31, 1927; Stevens Point, November 9, 1927; Madison, November 11, 1927; Milwaukee, November 15, 1927; Manitowoc, November 16, 1927, at 9 o'clock; Green Bay, November 16, 1927, at 3 o'clock; Madison, December 3, 1927.

At these various hearings the following appearances have been entered:

Herbert J. Olson in person and by his attorney, L. D. Jaseph, of Kittell, Jaseph, Young and Everson, attorneys, Green Bay; H. M. Case, of Case Carrier Company, in person, and by Kittell, Jaseph, Young and Everson, attorneys, by L. D. Jaseph; Earl W. Barcome, in person, and by Kittell, Jaseph, Young and Everson, attorneys, by L. D. Jaseph; Kittell, Jaseph, Young and Everson, attorneys, by L. D. Jaseph, appearing for Joseph Huettl; Nels Christensen appeared for himself; F. H. Muck, appeared in person, and by T. P. Silverwood, attorney, Green Bay; W. F. Nyswonger appeared by T. P. Silverwood, attorney; Oscar Mays appeared by T. P. Silverwood, attorney, Green Bay; Edward Polaski appeared in person and by T. P. Silverwood, attorney, Green Bay; Fred H. Frank appeared in P.U.R.1928B.

person, and by T. P. Silverwood, attorney, Green Bay; William Woodke in person, and by T. P. Silverwood, attorney; Green Bay & Western Road Company, by J. R. North and L. C. Jorgenson, and by North, Parker, Bie and Welch, attorneys, appeared in opposition to Fred H. Frank, Case Carrier Company, Joseph Huettl; D. E. Riordan, attorney for the Chicago & North Western Railway Company, appeared in opposition to Case Carrier Company, F. H. Muck, E. M. Davis, West Bend Transit & Service Company, Gunsolus Brothers, Peter H. Dvergedal, George Sarbacker, West End Truck Line, F. C. Steckelberg, John Kramer, L. E. Gruber, Capital City Truck Line, Joseph Bedner, E. H. Lamp, J. R. Capper, William Young, Richards Brothers, Oliver F. Carlson, Milwaukee Transport Service Company, Carl E. Timm; R. N. Van Doren, general counsel, for the Chicago & North Western Railway Company, appeared in opposition to Clarence Vike; A. W. Bower, Division Freight and Passenger Agent, for the Chicago & North Western Railway Company, appeared in opposition to John Hamre and Ray Schimming d/b as Madison-Fond du Lac Truck Line; W. L. Colburn, for the Chicago & Northwestern Railway Company, appeared in opposition to Rudolph Grandlie, Capital City Cartage Company, Cudahy Express; Mr. Wilson, for the Chicago, Milwaukee & St. Paul Railway Company appeared in opposition to Oscar Mays; H. J. Killilea, for the Chicago, Milwaukee & St. Paul Railway Company, appeared in opposition to Walter E. Bock, E. M. Davis, Milwaukee Transport Service Company; J. H. Judge, E. Erickson, and F. J. Bolting, for the Chicago, Milwaukee & St. Paul Railway Company, appeared in opposition to George Bremner, C. W. Schultz, Paul Koerth; J. A. MacDonald, for the Chicago, Milwaukee & St. Paul Railway Company, appeared in opposition to Capital City Cartage Company, Verdie A. Johnson, Edmund G. Dowe, W. B. Doty, P. H. Ohlsen, John Hamre and Ray Schimming, d/b as Madison-Fond du Lac Truck Line; C. L. V. Craft, Freight Agent, for the Chicago, Milwaukee & St. Paul Railway Company, appeared in opposition to Carl F. Rudolph; O. A. Frick, for the Chicago, Milwaukee & St. Paul Railway Company, appeared in opposition to J. R. Capper, William Young, Richards

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Brothers; The Milwaukee Electric Railway & Light Company, by L. A. Tarrell and H. G. Monger, appeared in opposition to Walter E. Bock, E. M. Davis; L. A. Tarrell appeared in opposition to Edmund G. Dowe, Schauers Fast Freight, Inc., Jones Transfer Line, Inc., Fred W. Port, Rudolph Grandlic, Cudahy Express, W. L. Ahrens, Milwaukee Transport Service Company, Capital City Cartage Company, William Woodke; Joseph L. Bednarek, assistant city attorney, for the city of Milwaukee, appeared in opposition to Walter E. Bock, E. M. Davis, Edmund G. Dowe, Jones Transfer Line, Inc., Schauers Fast Freight, Inc., Fred W. Port, W. L. Ahrens, Milwaukee Transport Service Company, Rudolph Grandlic, Verdie A. Johnson; C. D. Reavley, for the American Railway Express Company, appeared in opposition to Roy Hagen, Joe Larson, Edward J. Berg, and F. H. C. Beckman, for American Railway Express Company appeared in opposition to H. J. Schultz, Guy Leiby; Victor B. Horngren, for the American Railway Express Company and Walter Bonell, for the same company, appeared in opposition to T. B. Jones; A. R. Baldwin, for the American Railway Express Company, appeared in opposition to J. R. Capper, William Young, Richards Brothers, Oliver F. Carlson, George Abts, Carl F. Rudolph; and T. L. Hawk, for the American Railway Express Company, appeared in opposition to Edmund Dowe, Carl Timm, W. B. Doty, and P. H. Ohlsen, and John Hamre and Ray Schimming, d/b as Madison-Fond du Lac Truck Line; P. J. McGough, attorney for the Chicago, St. Paul, Minneapolis & Omaha Railway Company, appeared in opposition to J. L. Hogue, Roy Hagen, G. L. Babcock, E. A. Ringhand, H. J. Schultz (Boyd), Edward J. Berg, Joe Larson; E. C. Frost, for the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, appeared in opposition to J. L. Hogue, G. L. Babcock, H. J. Schultz (Boyd), Guy Leiby, Clarence Hovland, and W. D. Boyce of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company appeared against Clarence Hovland; Q. H. Hale, attorney, for Green Bay & Western Railroad Company, appeared in opposition to George Abts, and Christ Dascher; United Brotherhood, by R. Empey, appeared in opposition to William Woodke, Edward Carmodey, and H. P.U.R.1928B.

J. Schultz, of Baileys Harbor; Sheboygan Association of Commerce, by J. R. Davey, appeared in opposition to William Woodke; Walter E. Bock, applicant, appeared for himself; E. M. Davis, applicant, appeared for himself; H. P. Schloemer, Secretary of West Bend Transit & Service Company, appeared in his own behalf; H. P. Schmidt, District Attorney, West Bend, appeared in his own behalf and on behalf of Washington county; Roy H. Proctor, attorney, appeared for Gunsolus Brothers; Frank Lucas, attorney, appeared for Clarence Vike, West End Truck Line, F. C. Steckelberg, Capital City Truck Line, Joseph Bedner, E. H. Lamp; Peter H. Dvergedal, appeared for himself; George Sarbacker, applicant, appeared for himself; C. W. Schultz, applicant, appeared for himself; George Bremner, applicant, appeared for himself; Paul Koerth, applicant, appeared for himself; E. G. Conley, attorney, appeared for Carl I. Ward, and Carl I. Ward appeared in person; L. T. Ried, attorney, appeared for L. E. Stevens, Oscar Sjolander, Oliver F. Carlson, Christ Dascher, Chas. M. Devine, Carl F. Rudolph; E. E. Barlow, attorney, appeared for George Abts; Roy Hagen, applicant, appeared for himself; J. L. Hogue, applicant, appeared for himself; G. L. Babcock, applicant, appeared for himself; E. A. Ringhand, applicant, appeared for himself; H. J. Schultz, applicant, appeared for himself; Guy Leiby, applicant, appeared for himself; Edward J. Berg, applicant, appeared for himself; Joe Larson, applicant, appeared for himself; Clarence Hovland, applicant, appeared for himself; M. C. Krogfos, applicant, appeared for himself; Elof Anderson, applicant, appeared for himself; T. B. Jones, applicant, appeared for himself; George Stoiber, applicant, appeared for himself; Verdie A. Johnson, applicant, appeared for himself, and by E. W. Hooker, attorney, Waupun; Stanley J. Witkowski, of Cudahy Express, applicant, appeared in person; Rudolph Grandlie, applicant, appeared in his own behalf; Fred Port, applicant, appeared in his own behalf; W. L. Ahrens, applicant, appeared in his own behalf; Milwaukee Transport Service Company, by John F. Stang, applicant, appeared in person, and E. A. McCormick, attorney, for Motor Transport Company, appeared in opposition to Milwaukee Transport Serv-P.U.R.1928B.

ice Company; Sawyer and Gehl, by Mr. Gehl, attorney, appeared for Jones Transfer Line; Carl Timm, applicant, appeared on his own behalf; W. B. Doty, applicant, appeared on his own behalf; W. Duerst, applicant, appeared on his own behalf; P. H. Ohlsen, applicant, appeared on his own behalf; Edward Federman, of Federman Brothers, applicant, appeared on his own behalf; Russell and Peters, by Mr. Peters, for Schauer's Fast Freight, Inc.; John Hamre and Ray Schimming, d/b as Madison-Fond du Lac Truck Line, applicants, appeared in their own behalf; Frank Potter, applicant, appeared for himself; Clark and Lueck, by Mr. Lueck, attorney, appeared for Edmund G. Dowe; John E. Borland, appeared for Snyder Motor Transit Company in opposition to Edmund G. Dowe, Schauer's Fast Freight, Inc., Jones Transfer Line, Inc.; Rein-Ausen Trucking Company, by Morris N. Rein and L. A. Tarrell of the Milwaukee Electric Railway & Light Company appeared for Rein-Ausen Trucking Company; Henry Vanden Bosch, applicant, appeared in his own behalf; Edward Carmodey, applicant, appeared in his own behalf; H. J. Schultz, Baileys Harbor, applicant, appeared in his own behalf; Charles W. Hess, applicant, appeared in person, and by C. R. Clark, attorney.

The regulation of common carriers of property by automobile was first made the subject of statute in 1925. For many years prior to that time the common carriage of passengers by automobile was covered by the statute, but until 1925 such statute did not cover the carriage of freight. These statutes required practically only the registration with the Railroad Commission of schedules, rates, etc., and as the laws could be enforced only through local enforcement officers, they had little sanction. The 1925 statute contained few changes from the statutes theretofore in effect, other than the inclusion of freight carriers, and the result was that carriers of freight, generally speaking, remained uninformed as to the existence of this law. Some of the larger operators were apprised of the law on account of their activities in attempting to secure the passage and enactment of a general regulatory law affecting their business, but the smaller operators remained for the most part ignorant of the fact that a law had P.U.R.1928B.

been passed requiring them to secure a certificate of registration from the Railroad Commission.

Chapter 395, Laws of 1927, provides that a certificate shall be issued to every operator for the routes, schedules, and rates which on March 1, 1927 were actually operated and were lawfully authorized by a certificate theretofore issued by the Railroad Commission. Existing bus lines were by that provision, generally speaking, authorized to continue operation and the same applied to these few larger truck operators who had already come under the law.

Until after the law became effective and until enforcement of it was inaugurated, the Commission, and undoubtedly, the legislature itself, had no real conception of the large number of truck operators who were engaged in common carriage, or of the extensive nature of their operations.

As a result of the Commission's activity in enforcing the provisions of Chap. 395, Laws of 1927, numerous applications of truck operators have been filed with the Commission. For the most part these operators are small operators using one or two trucks on lines which radiate out from jobbing or distributing points to small localities nearby. These truckers provide the merchant in the small town with a service which he cannot possibly receive by rail. Almost invariably deliveries by truck are made the same day on which the shipment is picked up, and often on the same day on which it is ordered from the wholesaler. This permits the handling of such perishable freight as fresh fruits and vegetables without refrigerator equipment, and without spoilage or damage. It permits the retail grocer to handle a fresher and more attractive stock for his trade, and permits the merchants generally to carry a much smaller inventory than would otherwise be possible and still satisfy the demands of their patrons.

For the trip into the distributing point a load is usually found of farm produce, such as vegetables, milk, cream, butter, eggs, poultry, cheese, etc., and the transportation of these commodities is thereby given the same advantages as are noted in the case of the commodities carried out. The bulk of the tonnage, however, is out of, rather than into, the larger centers.

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While no investigation has been made as to the relative costs of transporting by truck and by rail, there can be little question that truck transportation for the short haul involves lower costs than the rail transportation. The ordinary trucker has practically no terminal cost other than that involved in the labor of loading and unloading as the truck performs a door to door service. The freight is handled once by the trucker whereas it must be handled several times when hauled by rail, and the nature of the handling by truck enables shipments to be carried safely with much less packing and crating than is necessary for shipments by rail.

Generally speaking, the rates in effect on the truck lines are in a decidedly haphazard condition. A great many of the truck operators are charging no set schedule of rates but get as much for each shipment as they can. Others have no uniform rule as to the application of rates and in most instances the rate schedules cover only the classes of freight which is ordinarily being transported. There is no uniformity in the rate levels among the various truck operators. The various rates have been established, generally speaking, on what the traffic would bear, and have, in most instances, remained constant at the established levels. The result is that there are schedules which provide rates very much below what the rail rates would be for the same mileage. Other schedules are made measurably comparable to the rail rates between the same points, and still others are considerably above the level of the rail rates. Solely on the basis of value of service, for the reasons stated, it would seem proper to fix truck rates at a somewhat higher level than the rates charged by the rail lines. Express rates are in all instances for the shorter distances, at any rate, so much above the level of the truck rates that they cannot properly be considered in fixing the rates for the truck service.

In order that the special ton-mile tax provided by Chap. 395, Laws of 1927, may be levied upon the operators which fall under the provisions of the law and the other regulatory features of the law properly enforced, it becomes necessary for the Commission to issue certificates at the earliest possible moment to all truck operators who are entitled to such certificates, and P.U.R.1928B.

to dispose of all applications promptly. By the terms of the law these certificates must contain the rates authorized to be charged for the service authorized by the certificate, and the result is that the Commission must determine immediately a question which can be properly determined only after considerable investigation and study, namely, the level of the rates for each particular operator. This is complicated by the fact that as has already been noted, a great many of the rate schedules are entirely incomplete and some are in fact entirely lacking with the result that there now are many rates which must be originally established. The rates which will be fixed in this order and which will be authorized in the certificates issued pursuant to this order, must for that reason be considered as having been established more or less summarily, and while they are believed to be reasonable by the Commission their establishment will in no way prejudice a later fixation of rates for permanent application. The rates herein approved must be considered as more or less temporary in nature to be applied by the various operators until such time as cause is shown by any interested party for their revision, or until such cause is disclosed by general or specific investigations on the Commission's own motion.

[1] In this order the Commission has recognized that the rates which have been established and actually applied to traffic by the various operators are *prima facie* reasonable. This was the rule which was adopted by the legislature and made the law in the case of railroads and public utilities when they were first placed under the regulatory jurisdiction of the Commission in 1905 and 1907. It is a practical necessity to adopt such a rule where an involved business with many units is placed at once under regulatory authority. The presumption in favor of existing rates, however, should not here prevail, even in the absence of other testimony, where the rates are manifestly unreasonable.

[2] As has already been remarked the legislature sought to prevent any unfairness by reason of Chap. 395, Laws of 1927, resulting in the destruction of established enterprises by providing that operators who were lawfully operating under cer-P.U.R.1928B.

tificates on March 1, 1927, should be entitled to a certificate authorizing such operation. We have also remarked the fact that in the case of truck lines or common carriers of freight the great majority, through ignorance of the former law, had no certificates on March 1, 1927. Most of them, however, were established before March 1, 1927, and many of them even long before the 1925 law was passed, and the Commission believes it should be its policy and that it will be giving proper effect to the intention of the legislature, if it adopts such policy, to be very liberal in construing the public interest in favor of the continuance of such service as was in fact rendered prior to March 1, 1927, in spite of the fact that the operators furnishing it may not have had a certificate on that day.

The following is a brief description of the various applications which have been made to the Commission, and which are covered by this decision.

Where we have referred herein to "Classification governed by the Western Classification" the reference is in each instance to the less-than-carload classification therein contained.

[Details and discussion in the disposition of individual applications omitted.]

Conclusions and Findings

[3] At many of the hearings it was developed that the applicants had not secured from the various villages and cities, in and through which they were operating, municipal consent to such operation, or approval of such portion of the routes as lay within the respective municipalities. Section 194.11, subsection (2) provides that no auto transportation company shall operate within or through any city or village "unless or until the consent of such city or village to such operation and also the approval thereof to the proposed routes, be first obtained." Such provision obviously does not impose any condition precedent upon the issuance of a certificate but only upon operation under such certificate. The Commission could not, as a practical matter, nor is it required under the law, require the consent and approval of the various municipalities before issuing the certificates. Whether operation can be lawfully insti-

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tuted under them until such consent and approval is had is another question. From the hearings it appears that practically none of the cities or villages have provided means by which municipal consent can be obtained by these operators, or municipal approval of their respective routes. That, however, as we have indicated, is a question to be settled between the various cities and villages and the operators themselves.

In view of the fact that it has been necessary for the Commission to deal rather summarily with these applications and to make findings herein in somewhat greater haste than under other circumstances would be warranted, the Commission believes that the findings herein made should not be considered as final, but that in all respects these findings and this decision and the order herein should be subject to such review by the Commission as may hereafter seem necessary or proper. Such review should be obtainable by and opportunity will, therefore, be given to any party herein or any other interested party upon a proper showing. Such review will, likewise, be exercised by the Commission on its own motion in any case in which facts shall come to the attention of the Commission which appear to justify such a review.

The Commission finds that the public interest requires a continuance of the service now and heretofore furnished by the various operators whose applications have been hereinbefore considered on the routes named in the applications, and in accordance with the schedules and with the rates therein specified, except to such extent as has been otherwise indicated above.

[4] Differences of opinion have arisen as to the correct interpretation of § 194.14 with respect to the insurance required of auto transportation companies engaged in the carriage of freight. The statute is not entirely clear as to whether the bond or insurance policy is required to cover the payment of damages to persons or to cover the payment of damages to the freight carried, or to cover both such forms of damage. Most of the applicants have, pursuant to direction, filed insurance policies in the ordinary public liability form assuring the payment of damages to persons, and for the present, such policies will be considered as satisfying the demands of the statute, but

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the Commission reserves the question, and if it should be determined that the statute should be interpreted otherwise, certificate holders will be required later to file such other policies as may be deemed **to be necessary** under the provisions of the statute.

It is therefore *ordered* that upon full compliance by each of the following named applicants with all of the requirements of Chap. 194 of the statutes, certificates be issued to them authorizing them to operate as auto transportation companies for the carriage of property or freight as follows:

1. For the transportation service along the routes and in accordance with the schedules, and at the rates specified in their applications to:

Edmund G. Dowe, Jones Transfer Line, Inc., Schauers Fast Freight, Inc., George Bremner, Walter E. Bock, C. W. Schultz, Milwaukee Transport Service Company, West Bend Transit & Service Company, Rudolph Grandlie, Stanley J. Witkowski and Edward Witkowski, copartners, as Cudahy Express; E. M. Gunsolus and M. V. Gunsolus, copartners, doing business as Gunsolus Brothers; Clarence Vike, Peter H. Dvergedal, George A. Sarbacker, Edward Lehr, doing business as West End Truck Line; Edward Federman and George Federman, copartners as Federman Brothers; John M. Noltner and Frank C. Kalscheur, copartners as Capital City Truck Line; Joseph Bedner, Charles W. Hess, and Frank Potter, Carl I. Ward, William Woodke, Henry Vanden Bosch, Henry J. Schultz, Edward G. Carmodey, H. M. Case, operating as Case Carrier Company; Nels Christensen, F. H. Muck, Earl W. Barcome, W. F. Nyswonger, Oscar E. Mays, Edward Polaski, Joseph F. Huettl, Fred N. Frank, George Stoiber, Carl F. Rudolph, Walter E. Richards, Oliver F. Carlson, George Abts, J. L. Hogue, G. L. Babcock, Edward J. Berg, Elof Anderson, T. B. Jones.

2. For the transportation service along the routes and in accordance with the operating schedule specified in their applications, and in accordance with the rates therein specified except as modified, altered, or indicated to be substituted by other rates as set forth in the foregoing opinion to:

W. L. Ahrens, E. M. Davis, Capital City Cartage Company, P.U.R.1928B.

Fred W. Port, Verdie A. Johnson, Carl E. Timm, W. B. Doty, W. J. Duerst, F. C. Steckelberg, P. H. Ohlsen, Paul A. Koerth, E. H. Lamp, Rein & Ausen Trucking Company, Herbert J. Olson, Charles M. Devine, J. R. Capper, William Young, L. E. Stevens, Oscar Sjolander, Christ Dascher, Roy Hagen, E. A. Ringhand, Henry J. Schultz, of Boyd, M. C. Krogfos.

3. For the transportation service along the routes and in accordance with the schedules and at the rates specified in their applications to:

I. E. Gruber, except that such certificate shall not authorize the carriage of freight or property between Madison and Mazomanie, or between such points and points intermediate through or between such intermediate points themselves.

John Kramer, except that the certificate shall authorize service only between Prairie du Sac and Sauk City on the one hand, and Mazomanie, Black Earth, Cross Plains, Middleton, and Madison on the other hand.

Guy R. Leiby, except that such certificate shall not authorize the carriage of freight or property between Eau Claire and Stanley, or between such points and intermediate points or between any such intermediate points.

Joe Larson, except that the certificate shall not authorize service to Rice Lake, and that the certificate shall also be limited so as not to authorize service between Eau Claire and Chippewa Falls, and from either of those points to Bloomer.

Clarence Hovland, except as to the restriction of service during winter seasons, which restriction must first be authorized by a subsequent approval of the Commission.

4. For the transportation service along the routes and in accordance with the operating schedules and at such rates as may be filed by them and approved by the Commission to John Hamre and Ray Schimming, doing business as Madison-Fond du Lac Line.

5. In the case of William Woodke, above named, if application for such certificate shall be withdrawn before the same is issued, the certificate to be issued to Henry Vanden Bosch may authorize daily service and may authorize also service between Green Bay and De Pere, at such rates as are contained in the application. P.U.R.1928B.

cation of William Woodke or as shall be filed by the said Henry Vanden Bosch and approved by the Commission.

Jurisdiction is specifically retained by the Commission to alter, amend, or revoke any of the findings hereinbefore made and any portion of this order, including the provision for the issuance of the certificate itself, and to alter, amend, or revoke any of the certificates which may be issued by virtue of these findings and this order.

ARKANSAS SUPREME COURT.

KANSAS CITY SOUTHERN RAILWAY COMPANY et al.

v.

ARKANSAS RAILROAD COMMISSION.

[No. 329.]

(— Ark. —, 299 S. W. 761.)

Commissions — Extent of jurisdiction of managerial question of service — Railroads.

1. The administrative function of railroads with regard to train service, depots, stations, spurs, etc., is peculiarly within the discretion of their managing boards and it was not the purpose of the legislature in a law (Act No. 149, Acts of 1907, amended by No. 338) providing for Commission approval of all such service arrangements to interfere with their directorate power to serve the interest of their stockholders so long as, by so doing, they do not conflict with the duty which they owe the public in such matters, p. 455.

Service — Jurisdiction of Commission over railroads — Signed petitions.

2. A petition for an adjudication of questions incident to train service signed by fifteen bona fide citizens residing in the locality affected is necessary to the jurisdiction of the Railroad Commission in such matters, p. 457.

Service — Jurisdiction of Commission over train service — Utility petitions.

3. A petition regarding railroad service is not required to be signed by fifteen citizens residing in the territory affected in order to give the Commission jurisdiction where the petition is brought by the railroad itself, p. 457.

Service — Jurisdiction of Commission over station agency.

4. The new Railroad Commission of Arkansas has, under a law (Acts 1921, p. 177) abolishing the Corporation Commission, inherited P.U.R.1928B.

all the powers and jurisdiction over the creation and abandonment of station agencies given to that body by a law (Acts 1919, No. 571, p. 411) creating the Corporation Commission and transferring to it all powers of the old Railroad Commission thereby abolished, which powers were granted under an amendment (2) of the Constitution and acts (1907, p. 356 amended by p. 821) notwithstanding the fact that such agencies were created by Legislative Acts (No. 50, Acts 1905), p. 458.

Service — Abandonment — Jurisdiction of Commission — Notice — Railroads.

5. The Commission has the implied power by virtue of legislative grants of jurisdiction over the creation and abandonment of station agencies to formulate, in the absence of statutory regulation, rules of procedure for the hearing of applications on the part of the railroad company to be permitted to abandon an agency which must provide for adequate notice to all interested parties, p. 458.

[November 21, 1927.]

APPLICATION by railroad for permission to discontinue a station agency; dismissed for lack of jurisdiction by Railroad Commission whose order was affirmed on appeal to circuit county court; reversed and remanded.

Appearances: James B. McDonough, of Ft. Smith, for appellants; H. W. Applegate, Attorney General, and John L. Carter, Assistant Attorney General, for appellee.

Wood, J.: On the 7th of October, 1926, the Railroad Commission of Arkansas issued the following order:

"There came on for hearing before the Commission the application and amended application of the Kansas City Southern Railway Company asking that the Commission issue an order to permit the Kansas City Southern Railway Company to discontinue its agent at Ravanna, Arkansas, and after due consideration of said application and all facts in the premises, doth find: That by a special act of the General Assembly of the state of Arkansas, approved February 23, 1905, the Kansas City Southern Railway Company under the provisions of said act was required to erect a depot at Ravanna and keep an agent therein to supply tickets, to receive freight for shipment, issue bills of lading, and to attend to all other services required of a station agent. The Commission holds that it does not possess the power to authorize the Kansas City Southern Railway Company to discontinue its agent at Ravanna, Arkansas, so long as P.U.R.1928B.

the special act of the legislature establishing the agent at Ravanna is in force. It is, therefore, by the Commission on this day *ordered* that the original and the amended application of the Kansas City Southern Railway Company, for authority to discontinue its agent at Ravanna, Arkansas, be and it is hereby dismissed from the docket of the Commission for the want of jurisdiction."

The railroad company appealed to the circuit court, and on the 27th of January, 1927, the circuit court entered a judgment, which recites, in part, as follows:

"This cause was submitted to this court upon the record duly certified to by the Railroad Commission of Arkansas, as required by law, and upon briefs of counsel. The court, being well and sufficiently advised in the premises, finds that this cause must be affirmed, for the reason that the Arkansas Railroad Commission did not have jurisdiction, because no petition signed by fifteen bona fide citizens residing in the territory at the station of Ravanna, Miller county, Arkansas, was filed for the discontinuance of the agency at that place. This court holds that, under §.1638 of Crawford & Moses' Digest, the Arkansas Railroad Commission is without jurisdiction unless a petition for the relief prayed for is signed by at least fifteen bona fide citizens residing in the territory sought to be affected by the petitioners. It is, therefore, by the court *ordered, adjudged, and considered* that the decision of the Arkansas Railroad Commission be affirmed and the case herein dismissed."

From the above judgment the railroad companies duly prosecute this appeal.

It will be observed that the only question for decision is whether or not the Railroad Commission has jurisdiction to entertain the petition of appellants to discontinue their station agent at the town of Ravanna, Arkansas. The Railroad Commission held that it had no power to discontinue because of the special act of the Legislature of 1905 requiring the maintenance of an agency at Ravanna, while the circuit court held that the Railroad Commission had no jurisdiction because no petition was filed signed by fifteen bona fide citizens residing in P.U.R.1928B.

the territory at the station of Ravanna for a discontinuance of the agency at that place. Both decisions are wrong.

[1] 1. Act No. 149 of the Acts of 1907, as amended by No. 338 of that section, provides in part as follows:

"Section 1. That the Railroad Commission of Arkansas be and the same is hereby authorized, empowered, and required to hear and consider all petitions for train service, depots, stations, spurs, side tracks, platforms, and the establishment, enlargement, equipment, and discontinuance of the same along and upon the right of way of any railroads in this state; provided, said petition shall be signed by at least fifteen bona fide citizens residing in the territory sought to be affected."

Section 2 requires the Railroad Commission, within thirty days after filing of the petition, to make a personal inspection of the conditions complained of and to investigate the objects sought to be accomplished by the petitioners, and gives the Commission power to hear testimony to determine the amount, degree, and character of construction, equipment, changes, enlargements of stations and depots which should be supplied by said railroad, railroad company, its lessees or operator. Section 2 concludes as follows:

"And shall have the power and authority to require a reasonable train service for each and every such railroad station and depot within the state of Arkansas, and their finding shall be binding upon all such railroads within the state of Arkansas."

Section 3 provides for the filing of the findings and decrees of the Commission with the secretary of state, Attorney General, and circuit clerk of the county where the decree is granted, and for notice upon the defendant railroad company of such decree by delivery of a copy of its findings and decrees to the nearest local station agent and to the superintendent, general manager, or other operator of such railroad or railroad company.

The fourth section provides for the penalty wherein a railroad company shall refuse to comply with the findings and decrees and mandates of the Railroad Commission, and provides that no order for doing anything under the act shall be made by the Commission until all parties concerned shall have received ten days' notice of such proposed change.

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The fifth section provides that the act shall not repeal any other act now in force or limit or curtail the powers and duties of the Railroad Commission of the state of Arkansas. See §§ 1638-1641, inclusive, C. & M. Digest.

In the absence of a statute, railroad corporations authorized to do business in this state would have plenary power over the matters set forth in the above statute. A consideration of all of its provisions convinces us that it was not the purpose of the legislature to take away or to curtail these powers except in so far as railroad companies might attempt to exercise them in a manner detrimental to the public they serve. The only justification for the lawmaking body or the courts to place limitations or restraints upon the rights and powers of railroad companies under their charter is because such corporations may, in the absence of such limitations or restraints, in some manner seek to promote their own private and financial interests to the detriment of the public. The administrative functions of these corporations in the matters specified in the statute are peculiarly within the power and discretion of their managing boards, and it was not the purpose of the legislature to interfere with their power and discretion to serve as best they may the financial interests of these corporations and their stockholders, so long as, by so doing, they do not conflict with the duty which they owe the public in such matters.

In *Northern P. R. Co. v. Washington Territory ex rel. Dustin*, 142 U. S. 492, 35 L. ed. 1092, 12 Sup. Ct. Rep. 283, the Supreme Court of the United States, among other things, said:

"The location of stations and warehouses for receiving and delivering passengers and freight involves a comprehensive view of the interests of the public as well as of the corporation and its stockholders, and a consideration of many circumstances concerning the amount of population and business at, or near, or within convenient access to one point or another, which are more appropriate to be determined by the directors, or, in case of abuse of their discretion, by the legislature, or by administrative boards intrusted by the legislature with that duty, than by the ordinary judicial tribunals."

See, also, 2 Elliott on Railroads, § 739, and notes 73 and 74. P.U.R.1928B.

[2] It was with a view of conserving the interests of the public that the legislature provided in the above statute that at least fifteen bona fide citizens residing in the territory affected should petition for the matters therein specified when petitioners conceived that the public interest would be subserved by the granting of the prayer of their petition. Such petitions are required and are essential to the jurisdiction of the Railroad Commission to consider and adjudge of any of the matters specified in the statute and set forth in the petition where the interest of the public is involved.

In *St. Louis, I. M. & S. R. Co. v. Bellamy*, 113 Ark. 384, 394, 169 S. W. 322, 324 (L.R.A.1915D, 91), we said:

"A petition for the establishment of depots, stations, etc., or the discontinuance of the same at one point and a relocation and establishment thereof at another, is necessary to give the Commission jurisdiction of the subject-matter."

See, also, *St. Louis & S. F. R. Co. v. State*, 120 Ark. 182, P.U.R.1916A, 868, 179 S. W. 342, Ann. Cas. 1917C, 873, where we again held that a petition as required by the act " . . . is essential to give the Commission jurisdiction' to act upon the matters mentioned in the act quoted from." We also said in that case at page 187 (179 S. W. 343):

"Evidently the legislature did not intend to burden the Railroad Commission with the consideration of petitions, for the things authorized to be petitioned for, unless at least fifteen bona fide citizens residing in the locality to be affected were sufficiently interested to petition therefor."

[3] These were cases in which petitions were filed seeking relief for the public against the railroad companies under the statute, and they clearly hold that where the interests of the public are affected in the matters set forth in the statute, a petition as therein specified is essential to give the Railroad Commission jurisdiction. But the statute does not require such a petition and same is not essential, when the railroad itself is seeking relief through the Railroad Commission from a burden which involves, as it in substances alleges, great financial loss to it, while the removal of such burden would not in any manner injure the public it serves at its station at Ravanna. The petitioners. P.U.R.1928B.

tion specified and required by the statute where the public is to be affected as against the railroad is not essential to give the Railroad Commission jurisdiction to grant relief to the railroad itself, which it asserts will not in any manner interfere with the service it renders the public at that station.

[4, 5] 2. This brings us to a consideration of the question as to whether or not the Railroad Commission had jurisdiction to discontinue the agency at Ravanna, notwithstanding the act of 1905 creating such agency. Act No. 50 of the acts of 1905 requires the Kansas City Southern Railway Company to erect a depot at Ravanna of suitable convenience for the traveling public and to provide a room at such station for the protection and storage of freight, and that this railroad company shall keep an agent at Ravanna to sell tickets, receive freight for shipment, issue bills of lading, and to attend to all services required of a station agent. Act No. 571 of the General Acts of 1919, p. 411, created an Arkansas Corporation Commission and gave it jurisdiction over common carriers, railroads, etc. That act abolished the Railroad Commission and transferred all of its powers and duties to the Corporation Commission. Sections 6 of that act, among other things, provides:

"Every person, firm or corporation engaged in a public service business in this state shall establish and maintain adequate and suitable facilities, etc., . . . and shall perform such service in respect thereto as shall be reasonable, safe and sufficient for the security and convenience of the public," etc.

Section 10 of that act gives the Corporation Commission power, among other things, to "make any other suitable order that the Commission may determine reasonably necessary to accommodate and transport the traffic, passengers or freight, transported or offered for transportation." Act No. 124 of the Acts of 1921, General Acts, page 177, abolished the Corporation Commission and transferred all of its proper functions to the Arkansas Railroad Commission. By Act No. 124 of the Acts of 1921, it is provided that the jurisdiction of the Railroad Commission "shall extend to and include all matters pertaining to the regulation and operation of all common carriers, railroads," etc., and "(b) all other jurisdiction, if any, possessed P.U.R.1928B.

by the Arkansas Railroad Commission under the laws of Arkansas, in force on March 31, 1919." Section 5. On March 31, 1919, the Arkansas Corporation Commission possessed all the jurisdiction that had been before possessed by the Arkansas Railroad Commission. Amendment No. 2 to the Constitution was declared adopted January 13, 1899. That amendment, in substance, provides that the General Assembly "shall pass laws to correct abuses and prevent unjust discrimination and excessive charges by railroads . . . for transporting passengers, freight," etc., and "shall provide for the creation of such offices and Commissions and vest in them such authority as shall be necessary to carry into effect the powers hereby conferred." The General Assembly, on March 11, 1899 (Acts 1899, p. 82), created a Railroad Commission. An examination of that act will discover that the powers conferred upon the Railroad Commission by the act creating it had reference to the regulation of railroad freight and passenger traffic in the state and the prevention of extortions and unjust discriminations therein.

The General Assemblies of 1901 (Acts 1901, p. 53) and 1903 (Acts 1903, p. 218) passed acts pertaining only to the powers of the Railroad Commission over tariff rates and the regulation thereof. Acts No. 149 and No. 338 of 1907, which are of the same purport, conferred upon the Railroad Commission additional powers to those of merely regulating tariff charges and discriminations therein and provided as set forth in Act 149 as amended by Act 338 of the Acts of 1907 as set forth above. The next act affecting the jurisdictions and powers of the Railroad Commission was that of April 1, 1919 (Act No. 571), abolishing the Railroad Commission and creating the Corporation Commission and conferring upon it all the powers and duties that were at that time exercised by the Railroad Commission. The next Act was No. 124, approved February 15, 1921, *supra*, abolishing the Corporation Commission, creating, or re-creating, the Railroad Commission, and transferring all the proper functions of the Corporation Commission back to the Railroad Commission.

Now, before the passage of the General Acts of 1907, *supra*, conferring upon the Railroad Commission the power, and re-
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quiring it to hear all petitions for train service, depots, stations, etc., there had been many special acts passed such as the Act of 1905 under consideration, and kindred acts, such as those requiring railroads to open and maintain depots, stations, to stop trains at certain points, and to keep and maintain agencies, etc. Many of the acts of this character were passed during the session of 1905 when the act under review was passed, and many such acts also were passed during the session of 1907 which conferred upon the Railroad Commission jurisdiction over such matters. The purpose of Amendment No. 2 to the Constitution was to confer upon the legislature the power to create offices or Commissions, and to confer upon such office or Commissions the power to correct abuses, and to prevent unjust discriminations, excessive charges in the matter of transporting freight and passengers, and to confer upon them such power as the legislature itself had in the matters pertaining to trains, depots, stations, etc., as set forth in the Act of 1907. It was doubtless conceived by the framers of the amendment and by the people in the adoption thereof that such an administrative body as a Railroad Commission, composed of few members, constituted and given jurisdiction over such matters, could more efficiently serve the public as well as the common carriers than the General Assembly itself could serve them. Therefore, the legislature was given power to create such a Commission and to delegate to it jurisdiction over the matters mentioned.

In *Helena Water Co. v. Helena*, 140 Ark. 597, 605, P.U.R. 1920B, 288, 292, 293, 216 S. W. 26, 28, speaking of Amendment No. 2 to the Constitution, we said:

"The argument in this case is that the amendment to the Constitution restricts the powers of any office or Commission created thereunder to those therein enumerated, viz., to the regulation of 'excessive charges by railroads, canals, and turnpike companies' and that it is beyond the authority of the legislature to impose any further duties on any offices or Commissions created for that purpose."

In answer to this argument we held, in effect, that it was within the power of the legislature to create either a Railroad Commission or a Corporation Commission to carry out the power. P.U.R. 1928B.

er enumerated in the amendment to the Constitution and other powers. We further said:

"It is, in other words, the power to correct abuses by transportation corporations, which is conferred by the Constitution, and not the creation of any particular offices or Commissions, and the legislature could, in the first instance, have created the present Commission, and conferred on it the enumerated powers and others."

The Act of 1907 is sufficiently comprehensive in its terms to give jurisdiction to the Railroad Commission to abolish agencies that have been created by special acts of the legislature, as well as to establish agencies where the Commission finds it necessary to do so. But, if we are mistaken in this conclusion, certainly the legislature, in the subsequent Acts of 1919 and 1921, *supra*, enlarged and extended the jurisdiction of the Corporation Commission and the Railroad Commission to which the Corporation Commission's powers were transferred so as to necessarily include by implication at least the power to abolish an agency as well as to establish one. This power is embraced in §§ 6 and 10 of Act No. 571 of the Acts of 1919, creating the Corporation Commission, and conferring upon it the power to establish and maintain adequate and suitable facilities, etc., and also, in § 10, to "make any suitable order that the Commission may determine reasonably necessary to accommodate and transport the traffic, passengers, or freight," etc. It is also conferred upon the Railroad Commission by Act No. 124, Acts 1921, transferring to it all proper functions of the Corporation Commission and giving the Railroad Commission jurisdiction over all matters pertaining to the regulation and operation of all common carriers, railroads, etc. A consideration of Amendment No. 2 to our Constitution and of the various acts passed since its adoption, creating the Railroad Commission, and conferring upon it the broad general powers prescribed in these several acts, convinces us that the Railroad Commission has jurisdiction over the subject-matter of abolishing railroad agencies as well as creating the same; and, by virtue of the powers expressly conferred upon it over the matters mentioned, it has the implied power, in the absence of a statutory regulation, to formulate P.U.R.1928B.

rules of procedure for the hearing of applications on the part of the railroad company to be permitted to abandon an agency, or to correct any abuses to which the railroad companies themselves are subjected. These rules must provide for notice to be given the public and all parties interested in the subject-matter.

The legislature, by vesting the Railroad Commission with these broad general powers over all matters pertaining to the regulation and operation of all common carriers, railroads, etc., and especially pertaining to the matters mentioned in Acts of 1907, relating to train service, depots, stations, etc., did not intend to repeal the special acts that had been passed, such as the Act of 1905 under review, relating to the subject-matters specified in the Acts of 1907. But it was the purpose of the General Assembly in enacting these statutes, notwithstanding these special acts, to confer upon the Railroad Commission the power, if the circumstances justified, to consider all matters over which the Railroad Commission is given jurisdiction under the general laws of Arkansas in force on March 31, 1919, which included the jurisdiction over the matters specifically mentioned in Act No. 149 of the Acts of 1907, as amended by Act No. 338 of that session, and the enlarged jurisdiction conferred by the later Acts of 1919 and 1921, *supra*. The comprehensive jurisdiction vested in the Railroad Commission by Act No. 124, *supra*, which as above set forth extends to and includes all matters pertaining to the regulation and operation of trains and all other jurisdictions possessed by the Arkansas Railroad Commission under the Constitution and laws of Arkansas in force on March 31, 1919, unquestionably confers jurisdiction on the Railroad Commission to correct all abuses that then existed, or might in the future obtain, by virtue of any act of the legislature covering the special matters designated by Act No. 149, as amended by Act 338 of the Acts of 1907, and all other matters pertaining to the regulation of all common carriers, railroads, etc., set forth in Act 124 of the Acts of 1921. Such sweeping jurisdiction necessarily embraces the power, at the instance of a railway company, to discontinue an agency P.U.R.1928B.

at a station where justified by the circumstances, although created by special act of the legislature.

Our conclusion, therefore, is that the Railroad Commission had jurisdiction to entertain the petition of appellants for permission to abolish the agency at Ravanna, and that the Commission should provide for notice to be given of the pendency of the petition, and an opportunity for all parties interested to appear and protest the application, and an opportunity for petitioner and protestants to take proof and to be heard on their respective contentions. From the final order entered by the Railroad Commission after such hearing, the statute (Act No. 124, § 20) makes provision for an appeal to the circuit court, and (§ 21 of Act 124) makes provision for an appeal by any party aggrieved from the circuit court to the Supreme Court. The circuit court, therefore, erred in affirming the decision of the Railroad Commission and in dismissing the application or petition of the appellants asking for authority to discontinue the agency at Ravanna.

The judgment is reversed and the cause is remanded, with directions to the trial court to enter a judgment setting aside the order of the Railroad Commission denying the appellant's petition and to certify its judgment to the Railroad Commission for further proceedings.

CALIFORNIA SUPREME COURT.

GOLDEN GATE FERRY COMPANY

v.

RAILROAD COMMISSION OF CALIFORNIA.

[S. F. 12388.]

(— Cal. —, 259 Pac. 745.)

Certificate of convenience and necessity — When required — Ferry vehicular service.

1. The inauguration of vehicular transportation by a ferry company previously authorized to carry passengers, within the provisions of an act (Stat. 1923, p. 836) exempting from the requirements of obtaining a certificate, ferries operating in good faith prior to the Public P.U.R.1928B.

Utility Act (§ 50[d]), is not such a new service as would require an application for a certificate of convenience and necessity therefor, p. 467.

Certificate of convenience and necessity — When required — Ferry vehicular service.

2. A ferry utility, possessed of the right to operate vessels between given points, under an exemption of the Public Utilities Act, (§ 50 [d] amended by Stat. 1923, p. 836) allowing the operation of ferries in good faith prior to the effective date of the regulatory act without a certificate, may properly amend tariff schedules on file so as to cover commodities not theretofore transported, p. 468.

Certificate of convenience and necessity — Operation in good faith prior to regulation — Ferries.

3. A ferry company operating more than one route by virtue of an exemption in favor of utilities operating in good faith prior to the regulatory act, may file tariffs for the transportation of vehicles on one of its routes, on which alone it had previously transported only passengers or had regular filed tariffs for such service, p. 469.

(LANGDON, CURTIS, and SEAWELL, JJ., dissent.)

[September 27, 1927.]

En banc. PETITION by ferry company to review an order of the Railroad Commission refusing to require another ferry company to secure a certificate of convenience and necessity for inaugurating vehicular service on one of its ferry routes; petition refused and order affirmed.

Appearances: Dudley D. Sales and Devlin & Brookman, all of San Francisco, for petitioners; Carl I. Wheat, of San Francisco, Arthur T. George, of Los Angeles, and Reginald L. Vaughan, of San Francisco, for respondent; Brobeck, Phleger & Harrison, of San Francisco, amici curiae; Guy V. Shoup, Evan J. Foulds, and Henly C. Booth, all of San Francisco, for Southern Pacific Company.

Richards, J.: This is an application for a writ of review. The petitioner, the Golden Gate Ferry Company, alleges that it was and now is engaged in the business of operating a public ferry for which tolls are charged for the transportation of passengers and self-propelled and other vehicles on, over, and across the waters of the San Francisco Bay; that it is the owner and in the possession of a franchise granted by the board of supervisors of the city and county of San Francisco authorizing the P.U.R.1928B.

establishment, operation, and maintenance of a public ferry between points in the said city and county of San Francisco and the city of Alameda, county of Alameda; that on the 26th day of March, 1926, petitioner filed its application with the Railroad Commission of the state of California, pursuant to the provisions of § 50 (d) of the Public Utilities Act (Stats. Ex. Sess. 1911, p. 18, and amendments thereto), requesting said Commission to issue and grant to petitioner a certificate of public convenience and necessity to operate vessels between the city of San Francisco and the city of Alameda; that a hearing was had thereon by said Commission, but no decision or order has as yet been made or rendered therein; that on or about September 3, 1926, the Southern Pacific Company, a railroad corporation, commenced the operation of a public vehicular ferry between a point within the city of San Francisco and a point within the city of Alameda; that in commencing said vehicular ferry service between said points, the Southern Pacific Company for the first time put into operation between said cities an entirely new, different, and distinct type of vessel; namely, that type of vessel which is designated as a vehicular ferry; that vessels of such construction and type had never theretofore been operated by said Southern Pacific Company between any points in San Francisco and Alameda; that on July 15, 1926, and prior to its operation of said vehicular ferry between San Francisco and Alameda, the Southern Pacific Company filed with the respondent Commission an amendment to its tariff schedules naming rates for vehicular ferry service between, among other points, San Francisco and the Alameda Pier; that said amendment was the first filing by the Southern Pacific Company of any rate for vehicular ferry service between any point in San Francisco and any point in Alameda; that prior to said amendment the Southern Pacific Company had no rate on file with the respondent Commission or any tariff applicable to the transportation of vehicles between any point in San Francisco and said Alameda Pier, or any other point in Alameda; that said Southern Pacific Company has never received or petitioned for or in any manner sought from the respondent Commission a certificate of public convenience and necessity to operate vessels.

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sels in vehicular ferry service between San Francisco and the Alameda Pier or any vehicular ferry service between the city of San Francisco and the city of Alameda; that there has never been issued to the Southern Pacific Company, nor to any of its lessors or subsidiaries, any such certificate of public convenience and necessity as required by the provisions of § 50 (d) of the Public Utilities Act, and said Southern Pacific Company is without lawful right, authority, or privilege to operate said or any vessels for automobiles or rather vehicular ferry service between the city of San Francisco and the said city of Alameda; that the Southern Pacific Company had not for a period of thirty-two years prior to September 3, 1926, engaged in the transportation of vehicles between any point in the city of San Francisco and the city of Alameda; that the respondent Commission, of its own motion, instituted a proceeding having for its purpose an investigation into the construction of facilities and the rendering of a vehicular ferry service by the Southern Pacific Company between said two points without first having obtained a certificate of public convenience and necessity; that the respondent Commission permitted the petitioner herein to intervene in said proceeding as an interested party; that petitioner has been and now is an interested party in said proceeding and in the action, determination, and decision therein; that the respondent Commission, on the 17th day of December, 1926, made, rendered, and filed its opinion and order (P.U.R.1927C, 172) concurred in by a majority of its members, declaring, in effect, that the Southern Pacific Company was and is not required to secure a certificate of public convenience and necessity under the provisions of § 50 (d) of the Public Utilities Act authorizing it to inaugurate a vehicular ferry service between the city of San Francisco and the Alameda Pier; that thereafter and within twenty days from the making of said order and decision the petitioner herein filed with the respondent Commission its petition for rehearing, which said petition was denied on January 6, 1927; that the majority opinion and order of the respondent Commission declaring that the Southern Pacific Company was and is not required to secure a certificate of public convenience and necessity, under § 50 (d) of the P.U.R.1928B.

Public Utilities Act, for the operation of a vehicular ferry service between the city of San Francisco and the city of Alameda, is illegal, void, and in excess of the jurisdiction of the respondent Commission. Wherefore the petitioner prays that this court enter its decree and judgment annulling and setting aside the majority opinion and order of the respondent Commission referred to above.

[1] The sole question presented in this proceeding for a review of said order revolves about the interpretation to be given to § 50 (d) of the Public Utilities Act, as amended in 1923. Stats. 1923, pp. 834, 836. The section reads:

"No corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, shall hereafter operate or cause to be operated, any vessel between points exclusively on the inland waters of this state, without first having obtained from the Railroad Commission a certificate declaring that present or future public convenience and necessity require or will require, such operation, but no such certificate shall be required of any corporation or person which is actually operating vessels in good faith, at the time this act becomes effective, between points exclusively on the inland waters of this state under tariffs and schedules of such corporations or persons, lawfully on file with the Railroad Commission."

It is contended by the Southern Pacific Company that its operation is and has been such as to bring it within the exemption contained in § 50 (d); that is to say, it is urged by said company that on August 16, 1923, the effective date of § 50 (d) of the Public Utilities Act, it was operating vessels in good faith between points exclusively on the inland waters of this state and more particularly between the city and county of San Francisco and the Alameda Pier, under tariffs and schedules lawfully on file with the respondent Commission. In view of the existence of these facts it is urged by the Southern Pacific Company that it may properly operate and maintain, by virtue of the exemption provision found in § 50 (d), a public vehicular ferry service between said points without first acquiring from the respondent Commission a certificate of public convenience and necessity.

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Petitioner contends, on the other hand, that the operation of a vehicular ferry service by the Southern Pacific Company between San Francisco and the Alameda Pier does not fall within the exemption provided for in said § 50 (d), for "that section exempted any existing operator from the necessity of obtaining a certificate of public convenience and necessity for any operations being conducted in good faith on that date, or for the exercise of any rights being exercised on that date, but did not exempt any operator from securing a certificate of public convenience and necessity for the commencement of any new operations not theretofore being conducted or for the exercise of any rights not theretofore being exercised."

The respondent Commission contends in its brief filed herein that:

"The Public Utilities Act of this state provides that no certificate shall be required from any corporation or person which on August 16, 1923, was actually operating vessels in good faith between points exclusively on the inland waters of this state under tariffs and schedules lawfully on file with the Railroad Commission. The evidence herein, in our opinion, shows that the Southern Pacific Company was, on that date, so operating between its Alameda Pier and San Francisco, and we, therefore, submit that no certificate was requisite before it might commence the operation here in question by transporting vehicles, as well as passengers, between these points."

We are unable to accept the interpretation placed upon § 50 (d) by the petitioner. The majority opinion of the respondent Commission would seem to be correct in declaring that:

"The operative right possessed by the Southern Pacific Company, by virtue of the exemption contained in § 50 (d) of the Public Utilities Act, is not limited to the class of service covered by the tariffs lawfully on file with the Commission on the effective date thereof, and that the said company may properly amend its tariffs to include therein rates for vehicular service, as has been done in this case."

[2] The legislature by its employment of the broad language found in § 50 (d) has evinced an intention to exempt from the requirement of securing a certificate of public convenience and P.U.R.1928B.

necessity all ferries actually operating vessels in good faith at the effective date of said section. Had it been desired to confine the exemption found therein to the class of service theretofore rendered by a ferry company, it would have been an easy matter for the legislature to have expressed such intention. In the absence of language so confining said exemption we are of the opinion that the Southern Pacific Company properly filed with the respondent Commission, in compliance with the provisions of § 15 of the Public Utilities Act, its amended schedules and tariffs covering vehicular ferry service between San Francisco and the Alameda Pier and thereafter properly commenced the carriage and transportation of vehicles and their contents between said two points. In other words, it is our opinion that a corporation or person possessed of a right to operate vessels between given points, under the exemption of § 50 (d), may properly amend the tariff schedules on file so as to cover commodities not theretofore transported. This conclusion would seem to be in harmony with the changing conditions of commerce. Any other construction of the exemption provision found in § 50 (d) would be narrow and unreasonable. This exemption provision was placed in the act, unquestionably, for the benefit of established ferry companies operating vessels between points on the inland waters of this state and to obviate the necessity of their having to acquire a certificate of public convenience and necessity.

[3] The early development of ferry service between the city and county of San Francisco and the county of Alameda tends to support the conclusion announced herein. By the year 1887 the Southern Pacific Company had purchased practically all of the stock of three independent groups of railroads theretofore operating in Alameda county. As a result of such purchase the Southern Pacific Company acquired the right to control and operate all of said railroads, together with any ferry service maintained in connection therewith. The ferry operations so acquired by the Southern Pacific Company included both vehicular and passenger ferry service between San Francisco and the Oakland mole, San Francisco and the Alameda Pier, and San Francisco and the foot of Broadway, Oakland—this latter P.U.R.192SB.

ferry being commonly known as the Creek route. In 1894 the passenger boats of the Southern Pacific Company operating between San Francisco and the Alameda Pier discontinued the carrying of vehicular traffic and the Creek route ferry was thereupon required to transport all vehicles destined for the city of Alameda. Thereafter and in the year 1912 the Southern Pacific Company likewise restricted the amount and character of vehicular traffic to be carried on its boats running between San Francisco and the Oakland mole, thus again augmenting the vehicular traffic passing over its Creek route ferry. This gradual expansion and enlargement of the vehicular ferry service over the Creek route together with the restriction of the vehicular ferry service on the passenger boats of the Southern Pacific Company placed the burden of carrying the major portion of vehicular traffic destined for Oakland or Alameda upon the Creek route ferry. It is true, however, that the Southern Pacific Company in 1923 again established a daily vehicular ferry service between San Francisco and the Oakland mole.

From the foregoing, it is readily apparent that the Creek route ferry has, for a number of years, served, indifferently, vehicular traffic, and, of recent years, particularly automobile traffic, traveling between the city of San Francisco and the contiguous cities of Oakland and Alameda. This ferry traverses a narrow estuary, known as San Antonio creek, the center line of which constitutes a common boundary between the said contiguous cities of Oakland and Alameda. *Alameda v. Oakland*, 198 Cal. 566, 246 Pac. 69. Said Creek route ferry has, therefore, for a great many years, undertaken to serve both Oakland and Alameda without distinction, and we, therefore, attach no particular significance to the fact that the east bay terminal of said ferry happens to be situated upon the Oakland side of said estuary. If such terminal had early been established upon the opposite and Alameda side of said estuary, the Southern Pacific Company undoubtedly would not be required to secure a certificate of public convenience and necessity as a prerequisite to a change of terminal to another point on the Alameda side of the estuary. The dual service rendered by the Creek route ferry, therefore, warrants the conclusion that the Southern P. U. R. 1928B.

cific Company need not procure a certificate of public convenience and necessity before establishing an automobile ferry service between San Francisco and the Alameda Pier. In other words, we are of the opinion that the exemption provision in § 50 (d) is such as to authorize the establishment and operation by the Southern Pacific Company of a vehicular ferry between said two points without first having to secure such certificate of public convenience and necessity. The Southern Pacific Company had on file with the respondent Commission a rate schedule covering the transportation of vehicles to and from Alameda by way of its Creek route ferry. In view of this fact, we are unable to perceive of any reason which would prevent it from amending said rate, as was done here, so as to provide for the transportation of a part of its vehicular traffic on a ferry operating directly to and from its Alameda Pier.

This determination is not at variance with the rule announced in the case of *Motor Transit Co. v. Railroad Commission*, 189 Cal. 573, P.U.R.1923A, 232, 235, 209 Pac. 586, which case is strongly relied on by the petitioner herein. The language of the exemption clause there considered clearly indicated that its provisions were to be confined solely to the service theretofore rendered by the utility, for it was provided that:

"No such certificate shall be required of any transportation company as to the fixed termini between which, or the route over which, it is actually operating in good faith at the time this act becomes effective."

No such restrictive language appears in the exemption provision herein concerned.

The conclusion we have reached renders it unnecessary that we consider the other contentions advanced by the parties.

The application is denied and the decision and order of the respondent Commission affirmed.

We concur: Waste, Ch. J.; Preston, J.; Shenk, J.

Langdon, J.: I dissent. It is undisputed that for a period in excess of thirty-two years immediately preceding September 3, 1926, Southern Pacific Company operated no vessels between any point in Alameda and any point in the city and county of P.U.R.1928B.

San Francisco except for the transportation of passengers carried on its trains. Prior to 1894 said company operated vessels which were used to transport vehicles between its Alameda Pier and a point in San Francisco. In December, 1894, however, the plank road along the Alameda Pier was torn up and since that time and until a new road was built in 1926, no service was offered to the public by Southern Pacific Company for the transportation of vehicles between any point in Alameda and any point in San Francisco. It is apparent, therefore, that whatever service the Southern Pacific Company or its predecessors may heretofore have offered to the public in the way of vehicular transportation between Alameda and San Francisco was abandoned. It would seem to follow that after such service was abandoned, the obligation to render it ceased and the right of the public to insist upon it was terminated. A similar situation was presented in the case of Atchison, T. & S. F. R. Co. v. Railroad Commission, 173 Cal. 577, P.U.R.1917B, 336, 160 Pac. 828, 2 A.L.R. 975. There railroad service between two points had been discontinued for about twenty years. A complaint was filed with the Railroad Commission to require the re-establishment of that service. The Commission made an order requiring the railroad company to re-establish the service. Upon appeal, it was held that the Commission acted beyond its jurisdiction, the following language being used:

"Nor is the fact that a railroad line had once existed between Fallbrook and Temecula a factor of any moment in the present inquiry. No question is made of the authority of the Railroad Commission to compel a railroad company or other public utility to restore a service which it has been furnishing. Here, however, the line between Fallbrook and Temecula had been destroyed for about twenty years before the action of the Commission was invoked, and, indeed, before the enactment of the law upon which the Commission relies for its authority to act. It is expressly found that 'that portion of the line was left abandoned and service discontinued. It has remained abandoned ever since.' In view of this fact, it cannot be doubted that any obligation of the predecessor of the Santa Fé Company to maintain and operate the line from Fallbrook to Temecula had long P.U.R.1928B.

since ceased (*Public Service Commission v. Philadelphia, B. & W. R. Co.* 122 Md. 438 [89 Atl. 726]) and that no such obligation ever rested upon the Santa Fé Company itself. The duty to maintain the line was dependent upon the right to maintain it, and this right was lost by abandonment (*Home Real Estate Co. v. Los Angeles Pacific Co.* 163 Cal. 710 [126 Pac. 972]), without regard to the question whether it had been forfeited under the provisions of § 468 of the Civil Code. The case must, therefore, stand precisely as it would if there had never been any connection between these two points."

Likewise in the instant case, it would appear that vehicular service between the points in question having been abandoned by Southern Pacific Company and its predecessors, there was no obligation upon the part of the company to render it and no right in the public to insist upon receiving it. How, then, can it be said that a certificate of public convenience and necessity was unnecessary to inaugurate this service because the Southern Pacific Company was "actually operating vessels in good faith under tariffs and schedules lawfully on file with the Railroad Commission?" Does this language of the Public Utilities Act mean to exempt a corporation, operating vessels in any type of service on the inland waters of this state, from securing a certificate, or does it mean to exempt a corporation that is operating a similar service to the one sought to be inaugurated, or does it mean to exempt a corporation that is operating, at the time the act became effective, a service which is later to be continued? The language of the majority opinion holds that the first alternative is the proper construction, but, later, attempts to characterize the new service inaugurated by the Southern Pacific as closely similar to the service previously rendered between different points and to make the differences between the two of no significance.

I am of the opinion that the third alternative is the one which was intended by the legislature, i. e., that a corporation is exempted from obtaining the certificate if it was, at the effective date of the act, actually operating a service in all respects substantially the same as the service to be rendered after the act became effective. Since it is apparent that the section of the P.U.R.1928B,

act under consideration is not clear and definite in expressing any of the above suggested alternatives, it becomes the duty of this court to construe the same with reference to the purposes sought to be served and the public policy underlying the legislation. The entire act evinces a determined purpose to give to the Railroad Commission power to regulate transportation on the inland waters of the state by granting or refusing certificates of public convenience and necessity, and to so construe the section we are considering as to exempt any person or corporation from applying for such a certificate, if it has been operating any type of vessel in any type of service before the act became operative, would leave with the Railroad Commission but a semblance of power. To construe the section so as to exempt a corporation from securing a certificate to carry freight if it has previously carried passengers over the same route, or to exempt it if it has previously carried freight over a different route, but one comparable in some of its features to the new route sought, would be to give an elasticity to the language, and the action to be taken under it, which would result in confusion and litigation and impotency on the part of the Commission. The safe, definite rule, and the one supported by the reason and purpose of the Public Utilities Act, would seem to be to construe the language, "operating vessels in good faith," to mean operating them in good faith in the essential and inherent features of the service sought to be continued after the effective date of the act. It seems apparent from the admitted facts that the Southern Pacific Company was not operating such a service at the date mentioned. A different type of vessel is to be used by the Southern Pacific Company from that used at the date of the act, a different route is to be taken, and a different class of service rendered.

As respondent clearly presents in its brief herein, the filing of a tariff amendment to the Creek route vehicular tariff is not the addition of a commodity to the Alameda passenger tariff. The tariff, which was amended, covered no service whatever between any point in the city of San Francisco and any point in the city of Alameda. At the time of the tariff amendment, the Southern Pacific Company was engaged in the operation of ves-

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sels between Alameda Pier and the ferry building in San Francisco for the transportation only of passengers transported over its railroad. It had no tariff on file for the transportation of any freight of any kind whatever. The operation of a vehicular ferry has no connection with the operation of a railroad service. It is in no way an adjunct of the railroad operation. A vehicular service could just as well be rendered by a corporation which had no rights whatever to operate a railroad. The Southern Pacific Company, in another action, successfully maintained this contention before this court. *Southern P. Co. v. Richardson*, 181 Cal. 280, 184 Pac. 3.

The majority opinion of the Commission, approved by this court, opens the door to a stretching of this section of the Public Utilities Act until it becomes a means of promoting the very evils it was designed to remedy. By this ruling, the Commission has curtailed the powers vested in it by law to determine the public convenience and necessity of future service to be rendered by transportation companies. Whatever ambiguity there may be in the section under consideration, the purpose of the act is too clear to warrant a construction which will weaken the Railroad Commission's control of public utilities.

We concur: Curtis, J.; Seawell, J.

CONNECTICUT SUPREME COURT OF ERRORS.

NEW HAVEN WATER COMPANY

v.

CITY OF NEW HAVEN.

(— Conn. —, 139 Atl. 99.)

Constitutional law — Police power limitation — Municipal rate contract with utility.

1. The right of a city to contract away its right as to rates to be charged by a public service corporation is the only limitation that can be imposed upon the police power by contract, p. 486.

Constitutional law — Police power — Time limit on municipal rate contract with utility.

2. The state cannot authorize a municipality to establish, by con-
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tract, rates to be charged by a utility for a perpetual or unreasonably long term since it would be a surrender of police power over rates and neither the "due process" nor the "contract" clause of the Constitution can have the effect of overriding that power, p. 486.

Constitutional law — Police power as to duration of rate contract — Not wholly void.

3. A rate contract between a municipality and a utility for an unreasonable term is not void *in toto*, being subject only to modification by lawful authority which is implied in all such contracts if they contravene the police power with respect to duration, p. 488.

Constitutional law — Police power — Rate contract of indefinite term having rate arbitration clause.

4. A rate contract between a city and a utility although for an indefinite term, does not, as to the city, contract away police power where it provides that rates must be fair and reasonable and gives the city a remedy by way of arbitration if the rates are unreasonable, particularly specifying the items which shall be taken into consideration by the arbitrators in fixing such rates, p. 488.

Constitutional law — Police power — Rate arbitration clause not mutual in indefinite term contract.

5. A rate contract for an indefinite term giving to the city the right of arbitration every five years, if unreasonable rates develop, but allowing no such remedy to the utility is as to the latter a rate contract of unreasonable duration and beyond the power of the General Assembly to grant either of itself or by delegation of authority by a municipality, being a surrender of the state police power over the regulation of rates, p. 488.

Rates — Powers of legislature — Contracts of unreasonable term.

6. Rates fixed by a contract authorized by the legislature for an unlimited or an unreasonable duration are in violation of the police power of the state, p. 489.

Rates — Powers of Commissions — To relieve from rate contracts of unreasonable duration — Rates.

7. The parties to a contract for rates of unreasonable or indefinite term as to either or both parties may, if they are unable to agree as to a reasonable duration, apply to the Public Utilities Commission, which has power under an act (Public Utilities Act 1921, Chap. 328) to determine a reasonable term and to fix rates if they also are unreasonable for such a term, p. 489.

Rates — Power of the courts to restrain unreasonable legislative action.

8. Courts will not interfere with the legislative authorization as to rates except in clear cases such as the unreasonable exercise of police power in fixing rates for an unlimited time, p. 489.

Rates — Reasonableness — Language of statutory provision as compared with rate contract.

9. It is immaterial whether the Commission or court on appeal make a determination of rates under provisions of a contract with a P.U.R.1928B.

city which requires that they be "fair and reasonable" or under the terms of the Public Utility Act (1921, Chap. 328) which provides that they be "just, reasonable, and adequate for public convenience, necessity and welfare," since the result of the use of either would amount to the same thing, p. 489.

Contracts — Ambiguity — Canons of construction — Tax indemnity.

10. An ambiguity in a rate contract providing for payment by a city of certain taxes levied upon a utility must be construed as including those kinds of taxes which the parties to the contract intended them to include, p. 489.

Contracts — Ambiguity — Public interest — Tax indemnity.

11. An ambiguity in a rate contract clause providing for payment by a city of certain taxes levied upon a utility must be resolved most strongly in favor of public interest where public interest is affected, p. 489.

Contracts — Ambiguity — Canons of construction — Tax indemnity.

12. An ambiguity in a rate contract clause providing for payment by a city of certain taxes levied upon a utility must be construed against the utility in whose favor the phrase was inserted, p. 489.

Contracts — Ambiguity — What the parties intended.

13. An ambiguity in a rate contract clause providing for payment by a city of certain taxes levied upon a utility cannot be construed by the rule *ejusdem generis*, or what was intended, where the Federal taxes sought to be recovered were not in existence at the time of execution, and hence could not have been within the contemplation of the contracting parties, p. 490.

Contracts — Ambiguities — Federal tax indemnity — Practical construction.

14. The acts of parties to a rate contract having an ambiguous clause providing for the payment annually or oftener by the city of certain taxes levied upon a utility is the most persuasive evidence of the true construction to be given the phrase and what the parties intended, and the payment by the utility of Federal taxes for seventeen years without protest raises a presumption that it never intended such taxes to be included, p. 491.

Rates — Contract of unreasonable duration — Alterable by state power.

15. Rates fixed by a contract between a city and a water company are not unalterable but continually subject to the exercise of the police power of the state when their duration is an unreasonable one, p. 492.

[October 3, 1927.]

CASE reserved from superior county court to the supreme court of errors for advice specifying four questions raised in suit by utility against city of New Haven for a declaratory judgment on whether it has a right to petition the Public Utilities Commission for an increase of rates notwithstanding its con-
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tract with the city and whether the city should not indemnify the utility for payment of Federal income and capital stock tax in accordance with the contract and whether the utility must furnish water for municipal purposes without cost; questions answered in opinion.

The plaintiff is a private corporation chartered by the General Assembly, in 1849, to supply New Haven with pure water for public and domestic use, and has supplied water to the city of New Haven since January 1, 1862. Through consolidations with other companies it supplies eight other towns with water, and through stock control of another company supplies another town with water. It owns property and pays taxes in sixteen towns in New Haven and Middlesex counties. It has acquired and developed available sources of supply within a distance of several miles from New Haven and built dams, reservoirs, and pumping stations for the distribution of water therefrom to New Haven and these other towns. It has purchased land and water rights in the towns of North Branford, Guilford, Madison, and Killingworth, in order to conduct the waters of the Hammonasset river and streams westerly thereof, by conduits and tunnels, into a large reservoir in North Branford and thence to distribute it to New Haven and the other towns. The plaintiff has begun to construct and there is now under construction in North Branford a large dam to impound the waters of these rivers and streams. On February 17, 1902, the plaintiff and the city of New Haven entered into a contract, which among other clauses, provided:

The plaintiff will furnish the city with a full and adequate supply of water for all reasonable present and future public and municipal purposes, including water for school and fire protection purposes, in certain designated wards for all time after the 20th day of February, 1902, or until the termination of the contract. If the works of the company shall at any time prove inadequate for these purposes and uses, the city shall have the privilege of annulling the contract. The city will, from time to time, at the request of the company adopt and enforce reasonable rules and regulations to prevent waste of water. The company agrees that the rates for water to be charged consumers

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of water in the city shall at all times be fair and reasonable, and if the city and company cannot agree as to rates which the city at any time shall consider unreasonable the matter shall be submitted to arbitration. The arbitrators shall not fix a rate for water which shall leave to the company an income insufficient to provide means with which to pay its operating costs, including interest on indebtedness, and all labor, material, salaries, damages, renewals, and extensions, repair and replacement of plant, and all taxes, together with a sum sufficient to pay the present rate of dividend upon its present capital stock and a reasonable return upon such other capital as shall in the future be invested in additions or extensions of the plant of the company not exceeding the present rate of dividend. The company shall, whenever in the opinion of its board of directors its income exceeds the sum required to properly care for the above purpose, reduce its rates of water to the inhabitants of the city. The contract gives at length the schedule of rates to be charged by the company.

If at any time it shall be determined in or by judicial proceedings that the company has not complied with the terms of the contract, or has refused to abide by the arbitration provided for in the contract, the city shall have the right to purchase all the property, assets, and franchises of the company upon paying to it a just and fair compensation therefor. In case the company shall sell or transfer its property and franchises to any other person or corporation, or in case a majority of the members of the board of directors shall not be residents of the city, or the company shall become a member of any trust or syndicate, the city thereupon shall have the right to purchase its property, assets, and franchises.

"Tenth. Said company shall pay such taxes as may be levied according to law upon its tangible property, including pipes, mains, and reservoirs, within the city of New Haven and other towns in which such property may be located. In case any franchise or other tax except upon its tangible property, shall be assessed against said company, said city shall save said company harmless from such part thereof as shall be measured by the ratio of the gross revenue received from consumers within the

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city of New Haven, to gross revenue of said company from all its consumers. Said city may, at its option, refuse to save said company harmless, as heretofore provided, and in case of its failure so to do, it shall, without other liability to said company by reason thereof, pay, during such period of failure, for water for fire protection the sum of \$20 per year for each hydrant, and for all other water used by said city at the lowest meter rates to private consumers, as per schedule then in force, less a discount of 25 per cent therefrom.

"Eleventh. At the end of twenty-five years from the 20th day of February A. D. 1902, and at the end of every successive period of twenty-five years thereafter, if said city shall determine to purchase the property, assets, and franchises of said company, said company will then sell and convey the same to said city upon said city paying a just and fair compensation therefor, which said compensation, if said parties cannot agree, shall be determined by a committee to be appointed by the superior court, in the manner provided by the act passed by the General Assembly at its January session, 1881."

"Fourteenth. Neither of the parties hereto shall be at liberty to avoid or set aside this contract, without the consent of the other, notwithstanding any breach thereof, except in the manner provided herein.

"Fifteenth. Said city and said company will unite in an application to the General Assembly, at its next session, for the passage of an act making the terms of this contract obligatory upon both parties as though specifically authorized in their respective charters."

The company made a stipulation to the contract on its date that nothing in the contract should be so construed as to prevent the city from sinking or driving wells on its property and using the water therefrom on the premises, provided that water shall not be distributed by the city either for public or private purposes in pipes or mains. And further, that the contract shall not be so construed as to charge any person a higher price for continuance of his present service than he has heretofore been charged for the same service unless changed by arbitration as provided in the contract. The company also stipulated that application shall, P.U.R.1028B.

at the option of the city, be made to the General Assembly for the confirmation thereof when the contract is presented for confirmation.

The finding further recites:

"The plaintiff has hitherto paid all taxes upon its tangible property as provided in said contract, and the city of New Haven has hitherto paid to the plaintiff the proportion of the taxes fixed in said paragraph tenth, upon the gross earnings of the plaintiff, under § 1370 of the General Statutes and amendments thereto.

"The plaintiff has paid to the United States the corporation taxes (imposed by act of Congress of August 5, 1909 [36 Stat. 11] and amendments thereto), and the capital stock tax (imposed by act of Congress of September 8, 1916 [39 Stat. 756], and amendments thereto) assessed against the plaintiff.

"The defendant has not saved the plaintiff harmless from any part of any of said income and capital stock taxes, nor has the defendant paid to the plaintiff for the water supplied to the defendant for fire protection and other municipal purposes.

"No demand was made by the plaintiff upon the defendant, with respect to such corporate income and capital stock taxes, until on or about August 20, 1926, when the defendant refused to pay said taxes."

On June 1, 1903, the General Assembly of the state of Connecticut passed a private act (14 Sp. Laws 1903, p. 276), as follows:

"Amending the charters of the city of New Haven and of the New Haven Water Company.

"Resolved by this assembly:

"Section 1. That the terms of a certain contract entered into by and between the city of New Haven and the New Haven Water Company on the 17th day of February, 1902, concerning the supplying of water for the use of said city and its inhabitants, be and they are hereby made obligatory upon the said city of New Haven and the said New Haven Water Company as though specifically authorized in their respective charters.

"Sec. 2. A certain stipulation executed and delivered by the New Haven Water Company to the city of New Haven on the P.U.R.1928B.

17th day of February, 1902, concerning the construction of the contract referred to in § 1 hereof, is hereby made obligatory upon the said New Haven Water Company whenever said city shall exercise its option to claim the construction, or any part thereof, in said stipulation particularly set forth."

The maximum rates fixed in said contract, to be charged to private consumers, have been maintained during the entire time said contract has been in force, and said maximum rates are still in effect.

The plaintiff claims that its revenues during the term of the contract, Exhibit A, hereinafter referred to, have been sufficient only to pay its operating costs, including interest on indebtedness, and all labor, material, salaries, damages, renewals, extensions, depreciation, repairs and replacements of plant, and taxes, together with a sum sufficient to pay dividends of 8 per cent upon its capital stock outstanding when said contract was executed, and dividends of 8 per cent upon such additional capital stock as has been issued since that date, and leave a small annual surplus, most of which has been invested in the plant.

The plaintiff will make the following claims before the Public Utilities Commission, if the court should decide that said Commission has jurisdiction: By reason of the great increase in the cost of all labor and materials, since February 17, 1902, and by reason of the heavy annual charges which would be necessary in order to raise the funds to carry out the improvements hereinbefore mentioned, the rates specified in said contract are no longer just and reasonable, and it is no longer just and reasonable that water should be furnished to the city of New Haven for fire protection, and for all other public and municipal purposes, without charge, and the rates prescribed in said contract will not be adequate to enable the company to discharge its duty to the public and the city of New Haven and neighboring towns, and to yield to the plaintiff a fair return upon its property, used and useful in the public service.

The defendant denies that under paragraph ten it is, or has been, under obligation to pay any portion of said corporation income or capital stock taxes, or to pay any sum to the plaintiff by reason of its failure so to do, either as to such income or cap-
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ital stock taxes hitherto assessed, or to such as may be assessed in the future.

The plaintiff claims a declaratory judgment:

(1) Are the rates to be charged by the New Haven Water Company as provided in the contract, Exhibit A, unalterable? Or are these rates subject to be increased by the Public Utilities Commission, beyond the schedule of maximum rates fixed in and by the contract, Exhibit A, within the city of New Haven, provided said Commission shall find that said rates as charged therein to and within the city of New Haven are discriminatory or less than just, reasonable, and adequate to provide properly for the public convenience, necessity, and welfare?

(2) That under the contract between the city of New Haven and the New Haven Water Company, dated February 17, 1902, the plaintiff, as to assessments heretofore made, was entitled to be saved harmless from such part of the Federal corporation income taxes and capital stock taxes as is measured "by the ratio of the gross revenue received from consumers within the city of New Haven, to the gross revenue of said company from all its consumers," and that if the city failed so to do, said company was entitled to be paid, during the period of failure, for water for fire protection, the sum of \$20 per year for each hydrant, and for all other water used by said city at the lowest meter rates to private consumers, as per schedule at the time in force, less a discount of 25 per cent therefrom.

(3) That under the contract between the city of New Haven and the New Haven Water Company, dated February 17, 1902, the plaintiff will be entitled, as to future assessments, to be saved harmless from such part of the Federal corporation income taxes and capital stock taxes as shall be measured by the ratio of the gross revenue received from consumers within the city of New Haven, to the gross revenue of said company from all its consumers, and that if the city shall fail so to do, said company will be entitled to be paid, during the period of failure, for water for fire protection, the sum of \$20 per year for each hydrant, and for all other water used by said city, at the lowest meter rates to private consumers, as per schedule at the time in force, less a discount of 25 per cent therefrom.

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Argued before Wheeler, C. J., and Maltbie, Haines, Hinman, and Banks, JJ.

Appearances: George D. Watrous, of New Haven, for plaintiff; Samuel A. Persky, of New Haven, for defendant.

Wheeler, C. J. (after stating the facts as above). We held in *Ansonia v. Ansonia Water Co.* 101 Conn. 151, 159, 125 Atl. 474, in conformity with the decisions of the Supreme Court of the United States, that rates fixed by contract between a public service corporation and its customers, whether private persons or a municipality, may be superseded by rates fixed by the state in an appropriate exercise of the police power except in two classes of cases. "First, those in which the state has in its Constitution or by statute explicitly conferred upon the municipality the power to establish by ordinance the rates to be charged by public service corporations operating within its limits;" and second, "the so-called 'franchise contract' cases." We are concerned with the first of these exceptions. The same rule must hold whether the power conferred by statute upon the municipality to establish rates be by contract or by ordinance. The exceptions, we say, are confined to cases "in which it clearly and unmistakably appears, first, that the state has delegated its rate-regulating power to the municipality, acting within its geographical limits, and second, that the municipality has with equal clarity and certainty exercised its delegated power by a contract fixing the rates to be charged for a limited term."

The General Assembly, in the act we quote in the statement, specifically made the terms of this contract obligatory upon the city and company. It was more than the delegation of power to fix the rates and make the contract; it was not only the legislative approval of the rates and the terms of the contract as made, but also the making of the same obligatory upon city and company. It was as though the contract had been made directly with the General Assembly. The act was a clear delegation by the General Assembly of its rate-regulating power to the municipality. The chief consideration to the company was the agreement of the city that it should have the exclusive right to sell water to the inhabitants of the city at the schedule of rates P.U.R.1928B.

specified. The consideration to the city was that its inhabitants were to get an adequate supply of water at the stated rates, and that the rates to be charged to all consumers of water in the city should at all times be fair and reasonable, and that it was to receive the water required for public purposes free, and have the right to purchase the company's property, assets, and franchise at the end of twenty-five years from the 20th of February, 1902, and every successive period of twenty-five years thereafter.

The obligation of the company under the contract is unlimited in duration; that of the city is also unlimited unless it shall consider the rates charged for water to be unreasonable, whereupon, if the city and company cannot agree upon the rates, the matter shall be submitted to arbitration, and, when it is confirmed by the court, it shall be conclusive for a period of at least five years from the date of the arbitration report. In effect, the act of the General Assembly amended the charter of the city and not only ratified the contract it had entered into with the water company, but made it obligatory upon it. This was as though authority to make this contract had been conferred in the charter of the city, and it had made the contract pursuant to such authority, and subsequently the General Assembly had not only ratified the contract, but expressly made it obligatory upon its agent, the city. In effect, too, it amended the charter of the water company. The General Assembly had before it the contract, as to the water company a perpetual contract, which by its terms the company could not change. It was this contract, unlimited in its duration, which the General Assembly authorized and made obligatory upon the parties to it.

The city contends that since the state has the power to enter into contracts unlimited in duration it may delegate this power to the city. The water company contends that the state cannot by contract forever disable the legislative branch of the government from regulating the rates fixed by contract between a public service corporation and a municipality, since this would entail the permanent surrender of its exercise of the police power. The water company emphatically asserts that this court has determined the precise question involved in the case of *Ansonia v. Ansonia Water Co.* 101 Conn. 151, 125 Atl. 474. We have P.U.R.1928B.

already indicated the extent to which this opinion went. It did not determine the question before us.

The ultimate question which we must decide is controlled by the Federal decisions. We quote from one decision of the United States Supreme Court; it is decisive of the settled rule of that court—*Public Service Co. v. St. Cloud*, 265 U. S. 352, 68 L. ed. 1050, 44 Sup. Ct. Rep. 492. The city of St. Cloud by ordinance granted to the Public Service Company the right to construct and maintain for thirty years works for the manufacture, distribution, and sale of gas at a specified rate. The company intended to increase this rate; upon the city's threat to interfere with the collection of the proposed increased rate, the company made application for an injunction and for an adjudication that the rate of the ordinance was confiscatory. The court held the ordinance and the acceptance of the franchise under it was a contract. Its opinion by Mr. Justice Sanford declared:

"It has been long settled that a state may authorize a municipal corporation to establish by an inviolable contract the rates to be charged by a public service corporation for a definite term, not grossly unreasonable in time, and that the effect of such a contract is to suspend, during its life, the governmental power of fixing and regulating the rates. . . . And where a public service corporation and the municipality have power to contract as to rates, and exert that power by fixing the rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and the question whether they are confiscatory is immaterial. *Southern Iowa Electric Co. v. Chariton*, 255 U. S. 539, 542, 65 L. ed. 764, P.U.R.1921D, 275, 41 Sup. Ct. Rep. 400, and cases there cited; *Paducah v. Paducah R. Co.* 261 U. S. 267, 273, 67 L. ed. 647, P.U.R.1923C, 309, 43 Sup. Ct. Rep. 335; *Georgia R. & Power Co. v. Decatur*, 262 U. S. 432, 438, 67 L. ed. 1065, P.U.R. 1923E, 387, 43 Sup. Ct. Rep. 613." *Home Teleph. & Teleg. Co. v. Los Angeles*, 211 U. S. 265, 273, 53 L. ed. 176, 29 Sup. Ct. Rep. 50.

[1, 2] The right of a city to contract away its right as to the rates to be charged by a public service corporation is a limited. P.U.R.1928B.

tion imposed upon the police power. Except as so limited, its power cannot be contracted away. The state may not authorize a municipality to establish, by contract, rates to be charged by a public service corporation for a definite term, which is unreasonable in time; it cannot authorize a contract as to rates for an unlimited or perpetual term, which necessarily would be grossly unreasonable in time since this would be a surrender by the state of its exercise of the police power of fixing and regulating rates. In *Atlantic Coast Line R. Co. v. Goldsboro*, 232 U. S. 548, 558, 58 L. ed. 721, 34 Sup. Ct. Rep. 364, 368, the Court said:

"It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

We declared in *Ansonia v. Ansonia Water Co.* *supra*, at p. 163 of 101 Conn.:

"The root of the matter is that the rate-regulating power of the state is a limitation on the right to fix rates by private contract; and that therefore the rightful exercise of that governmental power cannot be said to impair the obligation of such contracts."

. . . "All the cases," we say at p. 159 (125 Atl. 477), "in which a contract between a municipality and a public service corporation, establishing the rates to be charged by such corporation has been held by the Supreme Court of the United States to suspend, during the life of the contract, the governmental power of fixing and regulating rates, divide themselves into two classes," namely, those to which we have referred in an earlier part of the opinion. *Hudson Water Co. v. McCarter*, 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. Rep. 529, 14 Ann. Cas. 560; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *Paducah v. Paducah R. Co.* *supra*; *Los Angeles v. Los Angeles City Water Co.* 177 U. S. 558, 44 L. P.U.R.1928B.

ed. 886, 20 Sup. Ct. Rep. 736; Puget Sound Traction, Light & P. Co. v. Reynolds (D. C.) 223 Fed. 371, 375; Barre v. Perry, 82 Vt. 301, 73 Atl. 574.

[3-5] The contract between the city and water company would not be void *in toto* though the rate provision was subject to modification by public authority. It and every similar contract as to rates carries with it the implied provision that it must not contravene the police power in respect to the duration of the contract, and that, if it does, it must yield to modification by lawful authority. So far as the parties to the contract are concerned, the rates contracted for must stand unless changed by their agreement or by public authority. The contract as to the city while for an indefinite period does not contract away the police power, since it provides that the rates must be fair and reasonable and gives a remedy to the city by way of arbitration if the rates charged are unreasonable, and particularly specifies the items which shall be taken into consideration by the arbitrators in fixing rates which are fair and reasonable. It also provides that the award shall be conclusive for at least five years. It results that the city may have the rates reassessed at intervals of five years. This is a limitation upon the indefinite term of the contract as to rates. An unlimited provision coupled with a power of arbitration for definite periods does not surrender the police power for an unlimited or for a grossly unreasonable period. The rates may be changed at every arbitration period. The contract as to the water company is for an indefinite period. A provision for the indefinite duration of the contract as to the water company is a surrender of the police power and beyond the power of the General Assembly to itself grant or to delegate the power to grant to a municipality. There is no provision for arbitration similar to that given the city. Had the provision for arbitration been equally applicable to the water company, no claim could have been made by it that the contract as to it was for an indefinite period since the rates would have been subject to reappraisement every five years. Under the Federal decisions we have quoted from and *Ansonia v. Ansonia Water Co. supra*, rates which are fixed by a contract authorized by the legislature for a definite term, which is not unreasonable in its duration, are con-

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trolled by the terms of the contract, "and the question whether they are confiscatory is immaterial."

[6-8] Rates which are fixed by a contract authorized by the legislature for an indefinite term, or an unreasonable term, are in violation of the police power, since their duration extends beyond a reasonable period. If the contract be for an indefinite term, or an unreasonable term, and the parties cannot agree as to a reasonable period of duration of the rates, upon proper application, the Public Utilities Commission may, under Chap. 328, Public Acts 1921, determine whether the duration of the rates is unreasonable—one for an indefinite term would necessarily be unreasonable—and so finding, fix the duration and their amounts. Since the duration of the rates in the contract before us as to the water company is for an indefinite term, the water company may at any time make application to the Public Utilities Commission for a finding that this term is unreasonable, and fixing a reasonable term and the rates as to it for such term. Courts will not interfere with the legislative authorization as to rates except in clear cases. But where the exercise of the police power in fixing rates for an unlimited time is manifestly unreasonable, courts will interfere. *State v. Bassett*, 100 Conn. 430, 433, 123 Atl. 842, 37 A.L.R. 131; *State v. Porter*, 94 Conn. 639, 642, 110 Atl. 59. "The legislative department is the judge, within reasonable limits, to determine what public convenience and public welfare require, and the wisdom of its legislation is not the concern of the courts." *State v. Bassett*, *supra*, at page 432.

[9] Whether the Commission or the court on appeal make the determination of the rates under the provision of the contract which requires that they be fair and reasonable, or under the terms of Chap. 328, Public Acts 1921, which, in effect, provides that the rates must be just, reasonable, and adequate for the public convenience, necessity, and welfare, becomes immaterial since both provisions mean the same thing. "Just" is the equivalent of fair, and rates which are adequate to enable the water company to provide properly for the public convenience, necessity, and welfare are reasonable rates.

[10-12] The tenth article of the contract provides that, in P.U.R.1928B.

case any franchise or other tax, except upon its tangible property, shall be assessed against the company, the city shall save the company harmless from a defined part thereof, or, on failure so to do, it shall pay a specified sum for water for fire protection and for all other water used by the city the lowest then meter rates to private consumers, less 25 per cent discount therefrom.

The United States has assessed against the company an income tax, under Act of Congress of August 5, 1909, and a capital stock tax, under act of Congress of September 8, 1916, which the company has paid, and the city has neither saved the company harmless from the payment of these taxes nor paid it for the water supplied for fire protection and other municipal purposes. The company made no demand upon the city for these taxes until on or about August 20, 1926.

The liability of the city to pay these taxes depends upon whether the income and capital stock taxes are included in the words, "Any franchise or other tax, except upon its tangible property." They are susceptible of this construction. They are also susceptible of a construction which would exclude them from these terms. They may refer to taxes imposed by the state or municipality, or both, or to all kinds of Federal taxes. The language is thus ambiguous. It is to be construed as including those kinds of taxes which the parties to the contract intended them to include. *Leonard v. Dyer*, 26 Conn. 172, 68 Am. Dec. 382; *Bean v. Atwater*, 4 Conn. 3, 10, 10 Am. Dec. 91. Several canons of construction are applicable. Since the public interest is affected, the language should be construed so as to protect that interest. Since this phrase of the contract was inserted for the benefit of the water company, its language must be construed most strongly against the company.

[13] Applying the rule *ejusdem generis* to this phrase, the Federal income and capital stock taxes cannot be brought within it. These taxes were not in existence when this contract was made, and there is nothing in the record to indicate that the parties anticipated the subsequent enactment of legislation creating these new modes of taxation. Moreover, the history of these taxes makes it clear that the parties to the contract never could have intended to include these taxes within this phrase. P.U.R.1928B.

A Federal income tax had been declared unconstitutional. A constitutional amendment proposed and enacted subsequent to the making of this contract, made the enactment of the income tax in 1909 possible. The capital stock tax of 1916 was enacted as a substitute for the corporation tax of 1909. Both taxes were, in 1902, foreign to the thought and business of the country; neither was within the contemplation of these parties.

The authorities reach a like conclusion in related instances. *Des Moines Union R. Co. v. Chicago Great Western R. Co.* 188 Iowa, 1019, 177 N. W. 90, 9 A.L.R. 1557, and cases cited; *Catawissa R. Co. v. Philadelphia & R. R. Co.* 255 Pa. 269, 99 Atl. 807; *Sharon R. Co. v. Erie R. Co.* 268 Pa. 396, 112 Atl. 242; *Park Building Co. v. Yost Fur Co.* 208 Mich. 349, 175 N. W. 431; *Haight v. Pittsburg, Ft. W. & C. R. Co.* 6 Wall. 15, 18 L. ed. 818.

[14] The water company has paid the Federal income tax for seventeen years and the capital stock tax for nearly ten years and never until August 20, 1926, made demand upon the city that it was entitled to be saved harmless from the payment of these taxes, yet the city had not only paid the company the proportion of taxes upon gross earnings of the plaintiff, as provided in article ten of the contract, but also the franchise tax enacted in 1915 (Laws 1915, Chap. 292) as an amendment to General Statutes, § 1370. Presumably the water company knew during this long period what taxes it had intended to include under this phrase. Its failure to either claim or demand those taxes is the most conclusive evidence of its understanding that they were not included within the phrase defining the liability of the city for taxes. The practical construction of the parties, for so long a period, of this part of the contract, which involved the yearly or oftener payment of two additional taxes, is most persuasive evidence of the true construction to be given this phrase. *Volk v. Volk Mfg. Co.* 101 Conn. 594, 601, 126 Atl. 847; *Safford v. Morris Metal Products Co.* 97 Conn. 650, 653, 118 Atl. 37; *Construction Information Co. v. Cass*, 74 Conn. 213, 217, 50 Atl. 563. The city is not liable for the income and capital stock taxes heretofore paid by the water company, nor will it be obligated to save the company harmless from future P.U.R.1928B.

assessments of these taxes, but the same must be paid by the company so long as they continue to be assessed and this contract shall continue. The water company must furnish the city with water for public and municipal purposes, including water for school and fire protection purposes without cost or charge, as provided under the provisions of the contract.

[15] We answer the questions upon which our advice is asked as follows: (1) The rates of the contract are not unalterable, but are continually subject to the exercise of the police power of the state when their duration is an unreasonable one. (2) The rates fixed in and by the contract may be increased or lowered by the Public Utilities Commission upon their finding that the duration of the contract is an unreasonable one and that the rates charged are not fair and reasonable to the New Haven Water Company, and thereupon they may fix a reasonable period for the duration of these rates and fix reasonable rates. (3) The city of New Haven is not obliged to save the water company harmless from such part of the Federal corporation income taxes and capital stock taxes as is measured "by the ratio of the gross revenue received from consumers within the city of New Haven, to gross the revenue of said company from all its consumers," which it has heretofore paid or may hereafter be obliged to pay. (4) The water company must furnish the city with water for public and municipal purposes, including water for school and fire protection purposes, without cost of charge, as provided under the provisions of the contract.

The other judges concurred.

KANSAS SUPREME COURT.

KANSAS GAS & ELECTRIC COMPANY

v.

PUBLIC SERVICE COMMISSION et al.

(— Kan. —, 261 Pac. 592.)

Monopoly and competition — Jurisdiction of Commission — Statutory powers.

1. The Public Utilities Act confers upon the Public Service Com. P.U.R.1928B.

mission the power to determine whether a community already occupied and served by one utility may be invaded by another utility giving the same kind of service, and whether the public interest or that of the utilities would be subserved by the construction and installation of a second system in the community, p. 495.

Certificates of convenience and necessity — Presumption confined to extent of operation prior to regulation — Electric utility.

2. A provision of the act (Rev. Stat. 66-131) interpreted, and it is held that a utility that was doing business in the state when the act was passed, and is proposing to enter a community not theretofore occupied by it, must obtain from the Commission a permit to do so and may be required to conform to reasonable regulations of the Commission in respect thereto, p. 495.

Constitutional law — Certificate requirements not a violation of rights — Electric utility.

3. Such a regulation and requirement is not a violation of the constitutional rights of the utility, p. 497.

Monopoly and competition — Power of the Commission to permit electric competition.

4. It is within the power of the Commission to determine whether a permission to a second utility would operate as a needless economic waste, disadvantageous alike to the public and the utility, and if these facts were found to exist to make an order regulating the service, in effect substituting regulation for competition, and even going to the extent of excluding the applying utility from the zone or territory already occupied and being served by another utility with the permission of the Commission, p. 502.

(December 10, 1927.)

Headnotes by the COURT.

APPEAL from judgment dismissing injunction proceeding to restrain enforcement of Commission order prohibiting invasion of territory by electric company; affirmed.

Appearances: Henry L. McCune, of Kansas City, and Fred S. Jackson and James E. Smith, both of Topeka, for appellant; M. J. Healy and John M. Kinkel, both of Topeka, Louis E. Clevenger, of Emporia, and William A. Smith, Attorney General, for appellees.

Johnston, C. J.: In this proceeding two electric power companies are contending for the right to supply a cement plant at Mildred, a large user of electric current, with the power necessary to the operation of the plant. The Kansas Utilities Company, hereinafter spoken of as the Utilities Company, P.U.R.1928B.

was organized on September 19, 1919, and has been engaged in manufacturing, distributing, and selling electric current to consumers in five counties near its headquarters at Ft. Scott, to wit, Bourbon, Allen, Woodson, Coffey, Anderson, and Linn counties. It applied to the Public Utilities Commission, now called the Public Service Commission, and hereinafter designated as the Commission, for a certificate or permit to carry on the business for which it was organized, and this was awarded on August 4, 1920. Later, and on March 15, 1923, by an amendment it changed its corporate name to the name now used, and obtained from the Commission a certificate of convenience and necessity to do business in the zone composing the counties named. It has transmission lines in this territory, and one of its lines reaches a point within 13 miles of the cement plant mentioned, and it had asked the Commission for authority to extend the line to the cement plant. The plant, it appears, is close to the load center of the Utilities Company.

The Kansas Gas & Electric Company, hereinafter designated as the Electric Company, was duly organized in 1910, and was authorized by the charter board of the state to carry on the business of manufacturing, distributing, and selling electric current in Kansas. It engaged in business and sold and distributed electric current to consumers in a number of counties in the state, but principally in Sedgwick and Butler counties. It appears to have a line to Bluffville, Wilson county, which was about forty-eight miles from the cement plant, and it applied for a permission to construct a transmission line to Mildred with a view of furnishing electric current to the cement plant, but it had not obtained a certificate of convenience and necessity for the extension or the furnishing of current in that zone. It further appears that the cement plant was ready and willing to buy current from either of the power companies which it found was able to supply sufficient current for the operation of the plant at a reasonable cost. A hearing was had before the Commission on January 3, 1925, nominally for authority of Utilities Company to build a transmission line to the cement plant, and at the same time the Electric Company applied to the Commission for permit to build a transmission line from Bluffville to Mildred.

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Elaborate pleadings and statements were filed and made and much testimony produced before the Commission by the parties, but there was a broadening of the issues and both of the contending parties joined in asking for a decision as to the power of the Commission to limit the territory in which a utilities company may operate. The Electric Company contended that the Commission had no jurisdiction to define limits or to prevent duplication of service in a community, and, in particular, had no power to exclude it from supplying electric current to consumers in any territory within the state. The Utilities Company contended that the Electric Company should not be allowed to invade the territory for which the Commission had granted it a certificate of convenience and necessity, it being shown that it was able, ready, and willing to supply current to all consumers within the zone or district over which a certificate of convenience and necessity had been granted to it by the Commission. At the end of the hearing the Commission decided that it had power to regulate the service and define the limits in which a public service utility may do business in the state, that the utility has and should have the present and exclusive right to operate in the territory for which a certificate had been granted, and that the Electric Company should refrain from interfering with the public service already established and maintained by the Utilities Company in the territory defined until authority to do so had been given by the Commission. Later, the Electric Company brought this action in the district court to enjoin the enforcement of the order, and, upon a demurrer setting forth the facts, the court held that:

"Where one utility is attempting to enter territory occupied and served by another utility of the same character, and where such competition would have the effect of duplicating service to the injury of the users of the community furnished, the Public Service Commission has the jurisdiction and authority to exclude the applicant company."

Judgment was accordingly given for the defendants.

[1, 2] The question first argued relates to the interpretation and effect of a section of the Public Utility Act, which provides:

"No common carrier or public utility governed by the provisions of this act shall be permitted to operate in any territory in which a public utility governed by the provisions of this act is operating, unless it is first authorized by the public utility commission to do so." P.U.R.1928B.

sions of this act shall transact business in the state of Kansas until it shall have obtained a certificate from the Public Utilities Commission that public convenience will be promoted by the transaction of said business and permitting said applicants to transact the business of a common carrier or public utility in this state. This section shall not apply to any common carrier or public utility governed by the provisions of this act now transacting business in this state." Rev. St. 66-131.

It is contended by the plaintiff that the last clause of the section made it unnecessary for it to obtain a certificate or permit to extend its business into territory not occupied by it when the Public Utility Act was passed, and that in fact it was entitled to occupy new territory and carry on its business without permission or any interference or interruption by the state or the Public Service Commission. The plaintiff, as well as some other utilities, had obtained authority and was already engaged in business when the Public Utilities Law was enacted. The status of these companies as going concerns was recognized by the legislature and a permit to enter the state and do business was deemed to be unnecessary. As to new utilities or those not yet authorized to do business in the state, it was provided that they could not come in and begin business until they had obtained from the Commission a certificate that the public convenience would be promoted by allowing them to enter the state and transact business as a public utility. A company already in the state which had an established business and was then giving service to the public was exempted from obtaining a permit, but the new company applying for admission was required to satisfy the Commission that public convenience would be subserved by permitting them to transact business in the state. When that permit was granted to the new company, it was placed on a par with those already in the state and engaged in serving the public. We think it was not the purpose of the legislature to relieve any public utility doing business in Kansas from the regulatory powers, supervision, and control of the Commission. It could not have been the intention, we think, to discriminate as between utilities admitted to and doing a like business in the state, supervising and regulating one and allowing another to run at P.U.R.1928B.

large, doing business as it chose, free from regulation or control. The Public Utilities Act is an elaborate one, giving the Commission full power and authority to supervise and control all public utilities, and nothing in it indicates a purpose that any of the utilities can escape this supervision and control or can claim a preference over another utility engaged in the same public service. Such a discrimination, if it was intended, could not be upheld. The first section of the act provides:

"The Public Utilities Commission is given full power, authority, and jurisdiction to supervise and control the public utilities and all common carriers, as hereinafter defined, doing business in the state of Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority, and jurisdiction." Rev. St. 66-101.

Looking over the different provisions of the act, it seems reasonably clear that the legislative purpose was to subject all utilities operating thereafter in the state to the same supervision and control. One already in the state and serving a community is allowed to continue such service to that community without the permit required of a utility entering the state after the law was enacted. If it desired to extend its service to other communities, a certificate of convenience and necessity for such extension must be obtained from the Commission and as to extensions it was subject to the same restrictions as utilities admitted to do business in the state after the Public Utilities Law was enacted, and to the same control as to regulations and service. If the Commission is vested with the power to regulate and limit the extent of territory in which a utility may extend its operations, and thus prevent wasteful competition and duplication of service, which would tend to cause inconvenience to the public and increase the cost of electric current to consumers, the plaintiff has no reasonable cause of complaint.

[3] Plaintiff contends that such power has not been vested in the Commission by the legislature, and, if exercised, would be an unconstitutional invasion of its rights. It is argued that the provision relating to certificates of convenience and necessity should not be applicable to utilities "now transacting business." P.U.R. 1928B.

ness in the state,"—is an added right to its franchise which cannot be constitutionally taken from it. Counsel says:

"By specially exempting the old companies from the new law all their rights were preserved, and this provision went much further than merely relieving the old companies from applying for a certificate from the new Commission. Whatever may be the powers of the Commission to create or protect a monopoly under the new section of the law, such powers by express enactment of the legislature do not extend to the old companies nor control their activities and property rights. The Commission is given no power of any kind to curb or limit corporate or franchise powers existing at the time the law went into effect. It has been asserted by the state at certain stages of these proceedings that the exemption contained in the section under consideration should be construed to apply only to such parts of the state as were actually occupied by plaintiff at the time of the law's enactment. But we assert that the more reasonable view is that the legislature must have known that franchises and public engagements are commonly accepted in entirety and not by piecemeal and intended to protect such franchises as had been accepted and were then being acted upon in their entirety."

It was further said that:

"The grant and the acceptance by a chartered company includes what could reasonably have been held in prospect by the company and all that could fairly have induced the incorporators to make their investments and assume the public duties imposed by the franchise, and that such rights, whether rising to the dignity of contracts or not, will not be forfeited or repealed, except upon a clear and unmistakable declaration of the legislature showing an intent to forfeit or repeal rights and privileges so acquired."

The regulations in question cannot be considered a part of the charter rights of the plaintiff, but constitute an exercise of the police power which the state retains for the protection of the public safety and welfare. It is too late to insist that utilities organized and chartered under our general law are not subject to the police power designed for the protection of the public and the utility as well. In *Atlantic Coast Line R. Co. v. Goldsboro*, P.U.R.1928B.

232 U. S. 548, 558, 58 L. ed. 721, 34 Sup. Ct. Rep. 364, 368, the Court said:

"It is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

See, also, *Union Dry Goods Co. v. Georgia Pub. Service Corp.* 248 U. S. 372, 63 L. ed. 309, P.U.R.1919C, 60, 39 Sup. Ct. Rep. 117, 9 A.L.R. 1420.

The Public Utilities Act in terms is made to apply to "all companies for the production, transmission, delivery or furnishing of heat, light, water, or power." Rev. St. 66-104. In a case where one telephone company was seeking to enter territory occupied by another and was enjoined from doing so, it was said among other things:

"The enactment of the Public Utilities Law was an extension of the police power of the state over such utilities, but it did not grant any additional rights to such utilities as were established and maintained before the adoption of that act; and the Baxter Telephone Company procured no rights thereunder which it can maintain against possible competitors. The Public Utilities Law was not enacted as an extension or enlargement of the powers and privileges of an existing telephone company." *Baxter Teleph. Co. v. Cherokee County Mut. Teleph. Asso.* 94 Kan. 159, 146 Pac. 324, L.R.A.1916B, 1083, 1087.

The power contested here has been recognized as existing in a number of our former decisions. In *Janicke v. Washington Mut. Teleph. Co.* 96 Kan. 309, 150 Pac. 633, a party had established a telephone system in a city and another company proposing to enter the city and transact a like business made application to do so, which was denied by the city council. A contract was made between the established company and the invading utility for an exchange of business, with the stipulation that the new utility should not put in telephone service within the city. P.U.R.1928B.

The new company, however, undertook to install phones in the city, which was a violation of the contract and of public policy. An injunction against its action was granted. In an appeal it was said:

"Two telephone systems serving the same constituency place a useless burden upon the community, cause sorrow of heart and vexation of spirit, and are altogether undesirable. The Public Utilities Commission, with its power over rates and sufficiency and efficiency of service, can quickly suppress any evil consequences of monopoly, and good public policy favors rather than discountenances a single system. In this instance the public was distinctly benefited by the arrangement whereby subscribers to each system each operating in a different field, acquired the free use of the other."

In treating of the policy of regulating and limiting the service to a single utility and its effect on the utility and the public, the court said:

"Moreover, in passing under the jurisdiction of the State Commission the defendants are not going to be subjected to some malignant influence. The Commission may require some more formality in the conduct of their business, but there are compensations. It will be defendants' duty to give adequate service at reasonable rates, but in return their business will be protected from wasteful and ruinous duplication and competition. Note the plight of the one defendant in this action which has made some effort to obey the law, the Wakeeney Company. Its service has been interfered with by a new company, the Trego, for whose benefit the connection between the lines of the Wakeeney Company and of the other defendants was severed in January, 1922. If the Wakeeney Company and the other defendants were giving efficient and sufficient service, the Trego Company should have kept out of the field or developed a field of its own. It had no right to interrupt the public service being performed by the other defendants. It was to prevent such mischievous rivalry that the law made a certificate of convenience to be issued by the Commission a prerequisite to engaging in a public utility business." *State ex rel. Helm v. Trego County* P.U.R.1928B.

Co-op. Teleph. Co. 112 Kan. 701, 705, P.U.R.1923C, 539, 543, 212 Pac. 902, 904.

The question was the subject of consideration in *Baxter Teleph. Co. v. Cherokee County Mut. Teleph. Asso. supra*, in which it was remarked that:

"We can see no fundamental difference between the telephone business and any other business, except that owing to its importance and general use one telephone system is likely to be more satisfactory and less expensive than where two or more such companies occupy the same field. This the legislature has recognized and has provided that as a matter of public policy no public utility like a telephone company, excepting one strictly mutual, will be authorized to do business until it has obtained a certificate or a license of authority as a public convenience and necessity within the community where it seeks to do business. . . . Prior to the passage of the Public Utilities Act any number of telephone companies which could persuade a city government to grant a franchise for the use of the streets and alleys might establish a telephone system within such city. The competition of these would affect the business and affect the revenues of other utilities of the same character which had previously been established."

In view of these decisions it is hardly necessary to refer to outside authorities, but we may refer to *Weld v. Gas & Electric Light Comrs.* 197 Mass. 556, 558, 84 N. E. 101, wherein it was said:

"In the first place, in reference to this department of public service, we have adopted, in this state, legislative regulation, and control as our reliance against the evil effects of monopoly, rather than competitive action between two or more corporations, where such competition will greatly increase the aggregate cost of supplying the needs of the public, and perhaps cause other serious inconveniences. . . . The state, through the regularly constituted authorities, has taken complete control of these corporations so far as is necessary to prevent the abuses of monopoly. Our statutes are founded on the assumption that, to have two or more competing companies running lines of gas pipe and conduits for electric wires through the same street would often P.U.R.1928B.

greatly increase the necessary cost of furnishing light, as well as cause great inconvenience to the public and to individuals from the unnecessary digging up of the streets from time to time, and the interference with pavements, street railway tracts, water pipes, and other structures [citing authorities]. In reference to some kinds of public service, and under some conditions, it is thought by many that regulation by the state is better than competition."

In Pond on Public Utilities (3d ed.) § 901, the subject of supplanting competition with state regulation was discussed, and it was said that:

"The theory of the regulation of municipal public utilities by the state through such a Commission is to avoid competition which is now generally recognized as a needless economic waste and an entirely insufficient method of securing the necessary regulation and control. Under this method the state through its Commission takes the place of competition and furnishes the regulation which competition cannot give, and at the same time avoids the expense of duplication in the investment and operation of competing municipal public utilities."

[4] We think the Commission had the power to regulate the service and define the limits prescribed, that its exercise operates beneficially to the public, and is not inimical to the interests of the utilities. Such an order is really advantageous to an invading utility whose application was denied, where the admission of a second utility would be a serious inconvenience to and burden upon the public, and where the duplication of service would necessarily result in an increase of expense in the production and delivery of the current. The plaintiff, as we have seen, had an established business in several communities when the law was enacted. It was entitled to protection as against another competitor which was proposing to invade a community the former was already serving. By the act it was given the right to appeal to the Commission to exclude the invading utility from constructing and establishing a duplicate system which would result in wasteful competition and the reduction of its revenues. If the invading utility had, like the plaintiff, been engaged in business when the Utilities Law was P.U.R.1928B.

enacted and was insisting on the right to operate in the community already occupied by plaintiff, without a permit, because it was in business when the act was passed, would the plaintiff concede that the invading company could enter and operate therein without a certificate of convenience and necessity from the Commission? Would it concede that the invading company was outside of the regulations of the act? In the circumstances, the plaintiff would need protection, and the Commission, upon application, would have the power, we think, to investigate and determine whether there was necessity for the duplication, or whether it would be wasteful and a useless burden upon the community. The plaintiff would have the right to insist that the invading company doing business when the law was enacted must procure a permit from the Commission before installing a second system the same as is required of a utility organized since the enactment of the law.

Our conclusion is that the decision of the district court was correct, and its judgment will be affirmed.

WISCONSIN SUPREME COURT.

PABST CORPORATION

v.

CITY OF MILWAUKEE et al.

(— Wis. —, 215 N. W. 670.)

Appeal and review — Scope of review — Questions properly before appellate court.

1. Findings of a trial court not questioned upon the argument of the case, nor challenged as being unsupported by evidence by any assignment of error, cannot be properly so questioned or challenged for the first time upon appeal although the court may, in view of the importance of the question, consider and decide it as if properly raised and presented, p. 504.

Reparation — Excess water rates — Estoppel.

2. A consumer is estopped to recover excess water rates or any additional damages which it might otherwise lawfully claim, where the money was paid to the city without questioning the right of the latter to collect it, and where it permitted the city to expend the money for the benefit of all consumers, including itself, p. 505.

[October 12, 1927.]

P.U.R.1928B.

MOTION by complaining water user to-rehear appeal from judgment of trial court denying the award of a claim for excess rates: motion denied. For former opinion see — Wis. —, P.U.R. 1927E, 105, 213 N. W. 888. See also, 190 Wis. 349, P.U.R. 1926D, 290, 208 N. W. 493.

Appearances: Lines, Spooner & Quarles and Glicksman & Gold, all of Milwaukee (H. J. Killilea and F. E. Jenkins, both of Milwaukee, of counsel), for appellant; John M. Niven, City Attorney, and Clifton Williams, Special Assistant City Attorney, both of Milwaukee, for respondents; Leon B. Lamfrom, of Milwaukee, *amicus curiae*.

Per Curiam: Appellant's motion for rehearing presents two questions not discussed in the opinion filed in this case.

[1] (1) That the court made findings which are wholly unsupported by the evidence.

The recital of facts contained in the opinion are not findings of fact. They are merely a statement of the facts established upon the trial, upon which the court based its decision. With the single exception of the statement that the patrons of the plant have dealt with it since it was first established as if the city had full power to fix rates, the facts stated in the opinion are based upon the findings of the trial court, or upon facts which were not in controversy upon the trial. The opinion has been corrected by striking therefrom this single erroneous statement of fact.

The findings of the trial court were not questioned upon the argument of the case, nor were these findings challenged as being unsupported by the evidence by any assignment of error. This question, now raised by appellant for the first time, is, therefore, not properly before the court; but in view of the importance of the case, and of the court's desire that every question involved should be determined on this appeal, the court has given as careful consideration to this question as if it had been raised by the proper assignment of error and argued at the time when that question should have been presented.

An examination of the record discloses that the facts admitted, either by stipulation or by pleadings, together with those facts P.U.R.1928B.

conceded by both parties upon the trial, establish the facts found by the trial court and stated by this court as a basis for its decision. Appellant by formal written stipulation expressly admitted the controlling fact upon which the decision was based; that is, that the appellant pursued a course of dealing with the city under which it made 15 consecutive payments of water rents under the increased schedule of rates without protest.

[2] (2) Appellant urges that this court should direct the entry of judgment for the excess of increased rates over the rate which prevailed before January 1, 1921.

Unquestionably, under a proper state of facts, the appellant might recover this excess under a complaint which demanded the payment of treble damages. *Oconto County v. Union Mfg. Co.* 190 Wis. 44, 208 N. W. 989. But the fundamental principles of estoppel upon which the decision was based are not changed by the fact that appellant may see fit to reduce the amount of its demand against the city. In either case the appellant's course of conduct is such that it ought not to be allowed to recover money which it paid to the city without questioning the right of the city to collect it, and which it permitted the city to expend for the benefit of all patrons of the municipal plant, including the appellant, without notice of any kind that it questioned the power of the city to establish the new rate, or to collect the increased rate which was paid by the appellant without protest.

The motion for a rehearing is denied, with \$25 costs.

INDIANA PUBLIC SERVICE COMMISSION.

RE CHICAGO, SOUTH BEND & NORTHERN INDIANA RAILWAY COMPANY.

[No. 9106.]

Service — Duty to serve — Street railway — Surrendered franchise.

1. An electric railway is still under the obligation to furnish street railway service to the public in a city through which it operates inter-urban cars if this can be done without placing too great a burden upon its system as a whole, notwithstanding the franchise has been surrendered as provided by law, p. 509.

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Service — Local service abandonment refused — Interurban railway.

2. A petition by an interurban railway to discontinue local service in a city on its system because of alleged failure of revenue should be denied if additional revenue can be obtained in the operation of such city service by efforts to run on regular schedule and with adequate facilities, p. 509.

[December 2, 1927.]

PETITION of an interurban railway to discontinue local city service; petition refused and increased local service ordered.

Appearances: Eli F. Seebirt, for petitioner; Aldo J. Simpson, City Attorney of Goshen, for respondents.

Ellis, Commissioner: On September 28, 1927, R. R. Smith, receiver for the Chicago, South Bend & Northern Indiana Railway Company, filed with the Public Service Commission of Indiana a petition requesting permission to discontinue street railway service in the city of Goshen, Indiana. Said petition, omitting caption and signatures, is as follows:

"Your petitioner, R. R. Smith, respectfully shows that he is the duly appointed receiver of Chicago, South Bend & Northern Indiana Railway Company, an incorporated company organized under the laws of the state of Indiana provided for the incorporation of street railway companies, and as such is engaged in operating a system of street and interurban railroad, extending from Goshen, in the state of Indiana, to Michigan City, in the state of Indiana, through the counties of Elkhart, St. Joseph, and LaPorte.

"That its system also includes the local street railway lines in the cities of Goshen, Elkhart, Mishawaka, South Bend, and Michigan City.

"That upon its lines the railway company carries passengers, freight, baggage, and express for hire, and is, and holds itself out to be, a common carrier.

"Your petitioner, said R. R. Smith, receiver for Chicago, South Bend & Northern Indiana Railway Company further shows that by order of the Federal Court of the United States for the Northern District of Indiana, South Bend Division, dated September 7, 1927, he was authorized, empowered, and directed to abandon said street railway service in the city P.U.R.1928B.

of Goshen, and to take all such steps as may be requisite and necessary to effect such abandonment, including the procurement of the consent of such public authorities as shall be legally requisite.

"Said R. R. Smith, receiver for Chicago, South Bend & Northern Indiana Railway Company further shows that in the city of Goshen, which has a population of approximately 9,000, the railway company has operated for a number of years past city street railway service over the interurban tracks of the railway company. That there were formerly two street railway lines in the said city of Goshen, one called the 8th street line, and the other called the Main street line. That in the fall of 1919 after a hearing before the Public Service Commission, an agreement was reached between the railway company and the city of Goshen, by the terms of which the 8th street line was abandoned and the railway tracks removed from the street. That under the terms of this agreement the Main street line was to be continued for a trial period. That service over said Main street line has been continued until the present time, although the earnings have constantly diminished and said service had been rendered at a serious loss to said railway company. That the operation of this line has been continued from year to year in the hope that the growth of the city would eventually increase the business of your petitioner to a point where the line would be at least self-sustaining. That your petitioner states the traffic is constantly decreasing instead of increasing and that it is evident this city service is neither a public convenience nor necessity.

"Your petitioner further states that the abandonment of said city street railway service would not require the abandonment of any of the present trackage in said city. That it would simply mean the discontinuance of the operation of one city street car which is now operated over the interurban tracks within the limits of said city on an hourly schedule as to part of the line and a half-hourly schedule as to the remainder of the line.

"Your petitioner in presenting this petition has purposely failed to include the valuation of the line in question, not only on account of the fact that no abandonment of trackage is con-
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templated but also on account of the fact that the cost of operation of the Goshen city street railway service, leaving out of consideration any cost of supervision, maintenance of track or overhead line, insurance, depreciation, taxes, or general expense, is greater than the receipts, so that the necessity for a valuation does not exist.

"Your petitioner further shows that the cost of operation of the Goshen City street railway service, considering only the items of wages, power, maintenance of equipment and accidents, as shown in Exhibit 'A' which is attached hereto and made a part hereof, entails a loss to your petitioner of 44 per cent.

"Wherefore, said R. R. Smith, receiver for Chicago, South Bend & Northern Indiana Railway Company prays that after due hearing and investigation, the Public Service Commission make an order granting the petitioner the right to discontinue city street railway service in the city of Goshen, Indiana, and all other proper relief."

Pursuant to legal publication and notice to interested parties, a hearing was held on said petition on October 27, 1927 in the court house, Goshen, Indiana.

The petitioner filed with the Commission the order of the United States District Court of Indiana on Petition No. 9 in the cause of Westinghouse Electric & Mfg. Co. v. Chicago, S. B. & N. I. R. Co. Said order authorized the said Smith, as receiver, to "abandon city service now rendered by the said Chicago, South Bend & Northern Indiana Railway Company in the city of Goshen, Indiana, and to take all such steps and do all such things as may be requisite and necessary to effect such abandonment, including the procurement of the consent of such public authorities or bodies as shall be legally requisite."

The evidence at the hearing showed that the city street car service now rendered by the petitioner in the city of Goshen is provided by one street car; that such service is not maintained on any regular schedule; that such service is unreliable and that some persons desiring to use such service are unable to do so on account of the failure to operate the same with any great degree of regularity and adherence to fixed schedule. That the facilities provided for such service are wholly inadequate.

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quate, the car in use being in such condition as to discourage patronage of the city line. Apparently no effort has been made for a considerable period of time to furnish reasonably adequate service and facilities, as contemplated by § 7 of the Public Service Commission Act.

The petitioner submitted in evidence Exhibit D, setting forth "Receipts and Part of Cost of Operation for the year 1926." This exhibit showed the following:

Receipts	\$5071.69
Partial cost of operation—	
Wages of operators	\$3058.73
Cost of power	1133.74
Cost of power for heating car	155.58
Cost of maintaining equipment	1833.58
Cost of accidents	950.86
	<hr/>
Total of above costs	\$7132.49
Loss	\$2060.80 = 40.6%

It will be noted from an examination of the figures contained in this exhibit that approximately one half of the total loss shown in the operation of the Goshen City line may be accounted for in cost of accidents.

[1] The petitioner obtained the right originally to operate its street railway service on the streets of the city of Goshen by reason of a franchise granted by said city. While this franchise was surrendered, as provided by law, the Commission is of the opinion that some obligation still rests upon the petitioner to furnish street railway service in the city of Goshen, if the same can be done without placing too great a burden on the petitioner, in view of the use made of the streets of the city in connection with the operation of the interurban railway.

[2] No detailed financial statement concerning the operation of the electric railway system of the petitioner as a whole was submitted to the Commission at the hearing, but that the entire deficit of \$2060.80 claimed for the operation of the city service in the city of Goshen in 1926 could have controlling effect upon the financial status of this company is very doubtful in the opinion of the Commission.

After consideration of all the evidence, the Commission finds that additional revenue could be obtained by the petitioner in the operation of the city service in the city of Goshen if some P.U.R.1928B.

effort were made to operate such service upon a regular schedule which would give the citizens of Goshen confidence in the dependability of such service and if adequate facilities were provided; that certain charges made to operating expenses during the year 1926 may not again appear in such amount during other years; that it may be entirely possible, with proper attention to this operation, to place it upon a basis where at least no appreciable loss would be suffered; that the petitioner is under some obligation to continue this service in the city of Goshen by reason of the use of the streets of said city for the operation of interurban railway lines.

In view of the above findings, the Commission is of the opinion that the petition should be denied, and it will be so ordered.

It is therefore *ordered* by the Public Service Commission of Indiana, that the petition of R. R. Smith, receiver for the Chicago, South Bend & Northern Indiana Railway Company, filed with the Commission on September 28, 1927, for the discontinuance of street railway service in the city of Goshen, Indiana, be, and the same is hereby denied.

It is *further ordered*, that the petitioner prepare and file with the Commission a suitable schedule for the operation of the Goshen city service, and that such schedule be reasonably observed by the petitioner in the operation of such service.

It is *further ordered*, that the petitioner in this cause shall pay into the treasury of the state, through the secretary of this Commission, the sum of \$5.56, expense incurred by the Commission in legal publication of notice of hearing in this cause, as required by law.

Singleton, McCardle, Harmon, McIntosh, Commissioners, concur.

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LOUISIANA PUBLIC SERVICE COMMISSION.

HOWARD KENYON DREDGING COMPANY

v.

LOUISIANA RAILWAY & NAVIGATION COMPANY

et al.

[Case No. 795, Order No. 477.]

Reparation — Constitutional jurisdiction of Commission superior to prescriptive statute.

The power and authority of the Commission under its rule (No. 68) with respect to refunding overcharges on freight movements within the state adopted pursuant to the provision of the state Constitution (1921) is superior to that of a law (Act 223 of 1914) fixing a prescriptive period of two years as a bar to the recovery of overcharges.

[December 16, 1927.]

COMPLAINT against common carrier for alleged excessive rates for the movement of structural steel, and demand for reparation; refund ordered.

By the **Commission**: This proceeding is similar to that disposed of in our Order No. 476 this day issued in Case No. 771, except as to the complainant, points of origin and destination and the time of the movement, and the amount of overcharge alleged.

As a special defense to this action the defendants plead the prescription of two years under Act 223 of 1914.

The Louisiana Public Service Commission was created by the Constitutional Convention of 1921.

"The power, authority, and duties of the Commission shall affect and include all matters and things connected with, concerning, and growing out of the service to be given or rendered by the common carriers and public utilities hereby, or which may hereafter be made subject to supervision, regulation, and control by the Commission. . . ."

"The said Commission shall have power to adopt and enforce such reasonable rules, regulations, and modes of procedure as it may deem proper for the discharge of its duties, . . ."

Rule No. 68 of the revised rules and regulations of the Commission is:

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"All overcharges on freight by any carrier shall be settled within thirty days after demand by consignee or his representatives, . . ."

Under the provisions of the Constitution we think that the power and authority of the Commission with respect to refunding overcharges on freight movements within the state is superior to that of Act 223 of 1914, if the act has any force at all. The Commission has not fixed a prescriptive period as a bar to the recovery of overcharges, and, assuming the existence of an overcharge, we think that Rule No. 68 governs.

As has been stated above, the facts in this proceeding upon which complainants rely to support their demand, are similar to those involved in our Order No. 476 of this date.

It is, therefore, *ordered*, that the Texas & Pacific Railway Company and the Louisiana Railway & Navigation Company, according as they participated in the transportation thereof, protect the rate on structural iron and steel on the two cars involved in this proceeding moving from Addis, Louisiana to Curtis, Louisiana, on the 9th day of March, 1925, and refund to the complainants the difference between the amount of freight charge demanded and collected on said shipments and the amount lawfully due thereon, amounting to \$244.57.

MAINE PUBLIC UTILITIES COMMISSION.

RE BETHEL LIGHT COMPANY.

[U-963.]

RE BLACK STREAM ELECTRIC COMPANY.

[U-964.]

RE FRYEBURG ELECTRIC LIGHT COMPANY.

[U-965.]

RE WESTERN MAINE POWER COMPANY.

[U-966.]

Consolidation, merger, and sale — Factors for consideration — Security issues — Valuation.

1. It is not necessary in a proceeding for Commission approval of P.U.R.1928B.

a consolidation of electric utilities for the Commission to determine in any way what portion of the property, if any, may be capitalized or will be recognized as a basis for rate-making purposes where the petition presents neither the issue of securities nor the fixing of rates, p. 515.

Consolidation, merger, and sale — Proper corporate procedure — Electric utilities.

2. A consolidation of electric utilities was approved upon a showing that proper corporate action had been taken by the several petitioners who authorized the sale of the property, rights and franchises involved, p. 515.

Consolidation, merger, and sale — Conditions — Service — Electric utilities.

3. A petition for the consolidation of electric utilities was approved upon condition that the purchasing utility prior to the sale take proper corporate action binding itself to assume the duties to the public previously incumbent upon the utilities merged, p. 516.

[December 28, 1927.]

PETITION by various electric utilities for consolidation by means of conveyance of property, franchises, and permits; petition approved.

Appearance: Everett H. Maxey, attorney for petitioners.

By the **Commission**: Petitions of the Bethel Light Company (U-963); the Black Stream Electric Company (U-964); Fryeburg Electric Light Company (U-965), and Western Maine Power Company (U-966) seeking authorization for consolidation with the Central Maine Power Company of all their properties, franchises, and permits (except franchises to be corporations) by means of a conveyance of all of their properties, franchises, and permits to the Central Maine Power Company.

A public hearing was ordered upon said petitions at the offices of the Public Utilities Commission, at the State House, in Augusta, on November 28, 1927, at 10 o'clock in the forenoon, and continued and finally heard on November 30, 1927. Notice was proved to have been given as ordered. There was no opposition to the granting of the prayer of the petitioners.

The Bethel Light Company was incorporated under the General Laws of the state of Maine on November 3, 1899, and under the provisions of its charter is furnishing electric service in the town of Bethel. The Central Maine Power Company, P.U.R.1928B.

through its subsidiary the Central Securities Corporation, owns the entire common capital stock of the Bethel Light Company.

The Black Stream Electric Company was incorporated under the General Laws of the state of Maine on November 16, 1915 and under the provisions of its charter is furnishing electric service in the towns of Hermon, Carmel, Etna, and Levant. The Central Maine Power Company, through its subsidiary, the Central Securities Corporation, owns all the common capital stock of the Black Stream Electric Company.

The Fryeburg Electric Light Company was incorporated under the General Laws of Maine, February 7, 1903 and under the provisions of its charter is furnishing electric service in the town of Fryeburg. The New England Public Service Company, a holding company owning a majority of the common capital stock of the Central Maine Power Company, owns all the common capital stock of the Fryeburg Electric Light Company.

The Limerick Water & Electric Company was organized under Chapter 159 of the Private and Special Laws of 1907, and the name was changed to the Western Maine Power Company by vote of the stockholders November 25, 1916. The Western Maine Power Company is a merger of the Steep Falls Lighting Company, Hiram Water, Light & Power Company, the Denmark Light & Power Company, Bridgton Water & Electric Company, and Bridgton & Harrison Electric Company, and is furnishing electrical service in the towns of Limerick, Newfield, Limington, Standish, Baldwin, Sebago, Naples, Casco, Raymond, Bridgton, Harrison, Hiram, and Denmark, and is furnishing water service in the town of Limington and Bridgton Center village. The New England Public Service Company, a holding company owning a majority of the common capital stock of the Central Maine Power Company, owns all the common capital stock of the Western Maine Power Company.

Section 40 of Chapter 55 of the Revised Statutes, as amended, ordains:

"Any public utility may henceforth sell, lease, assign, mortgage, or otherwise dispose of, or encumber the whole or any part of its property necessary or useful in the performance of its P.U.R.1928B.

duties to the public, or any franchise or permit, or any right thereunder, or by any means whatsoever, direct or indirect, merge or consolidate its property, franchises, or permits, or any part thereof, with any other public utility, when, and not otherwise, it shall have first secured from the Commission an order authorizing it so to do. . . ."

The Central Maine Power Company by virtue of authority of said § 40 may legally acquire the properties and franchises (except franchises to be corporations) of said companies.

[1, 2] The purposes in the cases before us have previously been considered and we have held that considerations guiding the Commission in matters of this kind are:

(1) The legal right of the purchaser of the new corporation or utility to acquire and hold the property affected by the consolidation, merger, or sale.

(2) The probable effect of the consolidation, merger, or sale, with reference to service in the territory affected; and

(3) The probable consequences of the sale, so far as the interest of the public is concerned with reference to rates, and any other particulars by which the public might be affected, including,—

(a) Petitioner's capacity to serve its present territory.

(b) To meet its obligations to present securities holders.

(c) Improvement of service, diminution of cost of management and operation.

Re Bar Harbor & U. River Power Co. U-598; Re Bridgton Water & Electric Co. U-657; Re Bangor R. & Electric Co. U-776, P.U.R.1925E, 705.

As the petition presents neither the issue of securities nor the fixing of rates, it is not necessary for us, at this time, nor do we determine in any way what portion of the property, if any, which is the subject of sale, may be capitalized or will be recognized as a basis for rate-making purposes.

Re Central Maine Power Co. P.U.R.1916A, 930; Re Citizens Light & Power Co. P.U.R.1915A, 510; Re Bar Harbor & U. River Power Co. U-598; Re Bridgton Water & Electric Co. U-657; Re Bangor R. & Electric Co. *supra*. It appears from the evidence that proper corporate action has been taken by the P.U.R.1928B.

several petitioners to authorize the sale of said property, rights, and franchises to the Central Maine Power Company.

[3] To insure the furnishing of reasonable, safe, and adequate facilities by the purchaser, the Central Maine Power Company prior to the sale should take proper corporate action binding itself to assume the duties to the public now incumbent upon the Bethel Light Company, the Black Stream Electric Company, Fryeburg Electric Light Company, and the Western Maine Power Company.

After consideration of the evidence adduced, it is *ordered, adjudged and decreed* 1. That upon corporate action being taken by the Central Maine Power Company, binding itself to assume and discharge the duties of the Bethel Light Company, the Black Stream Electric Company, Fryeburg Electric Light Company, and Western Maine Power Company, the said Bethel Light Company, the Black Stream Electric Company, Fryeburg Electric Light Company, and Western Maine Power Company are hereby authorized to sell, transfer, and assign their rights, privileges, permits, franchises (except franchises to be corporations) property, and interests to the Central Maine Power Company.

2. That the Bethel Light Company, the Black Stream Electric Company, the Fryeburg Electric Light Company, and the Western Maine Power Company report to this Commission in writing, supported by the oath of one of their principal officers, their doings hereunder within sixty days from the day of the date hereof.

MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES.

**RE BOSTON, WORCESTER & NEW YORK STREET
RAILWAY COMPANY.**

[D. P. U. 3009.]

***Valuation — Ascertainment of value for sale — Receiver's sale of
street railway.***

1. The sale price at a receiver's sale is not necessarily indicative of the value of property for street railway purposes where practically
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the only bidders were bondholders who had assented to a reorganization plan, who, accordingly, did not care to increase the amount available for distribution to nonassenting bondholders, and members of a reorganization committee who would not bid higher for the same reason, p. 520.

Security issues — Amount — Upset price at receiver's sale — Street railways.

2. The upset price of street railway property fixed by the court in a receiver's sale is of little importance in determining the amount of stocks and bonds which may be properly issued in capitalizing a new company which is organized for the purpose of operating the property, p. 520.

Return — Profit on valuation not in excess of reproduction price — Street railways.

3. To permit a company purchasing a street railway at a receiver's sale to make a profit, if it is able, upon a valuation not in excess of the reproduction price of the property, which is less than the original investment, is not an unfair burden upon the public, especially where an opportunity will thereby be afforded to bondholders of the defunct operating company to recover the value of their investment, p. 520.

Security issues — Conditions to issuance — Receiver's sale of street railway property.

4. Mortgage bonds and the securities incident thereto of a company purchasing a street railway at a receiver's sale were all ordered to be deposited and made available to the receiver in accordance with the foreclosure decree of the supreme judicial court, and the rights of a reorganization committee with an underwriting syndicate were ordered to be acquired by the purchasing company, as conditions precedent to the issuance of stocks and bonds of the company, p. 521.

[November 23, 1927.]

PETITION of purchaser of street railway at receiver's sale for approval of issue of capital stock, first mortgage and reorganization mortgage bonds; petition approved.

By the **Commission**: This is a petition of Boston, Worcester & New York Street Railway Company, a corporation duly organized, for the approval of the issue of stock and bonds to acquire the railway and property, including rights, locations, privileges, and franchises formerly operated by Boston & Worcester Street Railway Company sold at receiver's sale on October 11, 1927, to Henry B. Rising. The Department on November 1, 1927, under authority of clause (h) of § 136, Chap. 161 of the General Laws, determined that the total amount of capital stock to be stated and fixed in the Agreement of Association of P.U.R.1928B.

Boston, Worcester & New York Street Railway Company, to wit, \$2,026,000, was an amount not exceeding the fair cost of replacing the railway and property to be acquired less the amount of outstanding mortgages, to wit, \$1,008,000, to which said railway and property may be subject in the hands of the new company; and approved \$2,026,000 as the total amount of the capital stock of said new company.

The new company proposes to issue forthwith \$2,026,000 par value of its capital stock (\$1,500 of which is to be issued for cash at par and we understand reacquired by the new company for delivery as a part of the purchase price), and to authorize and issue \$252,000 principal amount of 7 per cent first mortgage bonds dated November 15, 1927, maturing November 15, 1947, callable at par and accrued interest, to be issued under and secured by a first mortgage of such part of its property and franchises as may be determined upon, such mortgage to permit a maximum issue of \$1,500,000 aggregate principal amount of first mortgage bonds, and \$756,000 aggregate principal amount of 5 per cent reorganization bonds, dated November 15, 1927, maturing November 15, 1947, to be issued under and secured by a closed second mortgage on the same property and franchises as are covered by the first mortgage, the whole interest on the reorganization bonds during the first two years of life, $\frac{3}{4}$ of the interest during the third and fourth years of life and $\frac{3}{8}$ of the interest during the fifth and sixth years of life shall be deferrable and not become due and payable until after all accrued and unpaid dividends have been paid on the prior preference stock of the company, if any outstanding, and then only if, in the opinion of the board of directors, the net earnings of the company are sufficient to justify such interest payment; provided, however, that in any event the deferrable interest shall be cumulative and shall be paid when the principal of the bonds become due (at maturity or otherwise) without at that time paying accrued and unpaid dividends on any class of stock then outstanding.

In taking over the property formerly operated by Boston & Worcester Street Railway Company from the purchaser at the receiver's sale the new company is to assume certain of the ob-
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ligations which said purchaser was required to assume in the purchase of the property by him from the receiver, but, as offsetting this, such purchaser is to pay over to the company not less than \$252,000 in cash, which appears adequate to discharge all of the obligations assumed by the purchaser and which have been, or are to be, assumed by the new company. Any balance of the cash will be used for working capital.

At the date of the appointment of the receiver the Boston & Worcester Street Railway Company had an outstanding capitalization of over \$5,000,000, the issue of all of which was approved by some board or commission representing the Commonwealth. Of this capitalization \$2,320,000 was represented by outstanding bonds carrying an annual fixed charge of about \$115,000. No interest was paid on these bonds from February 1, 1923, down to date. The mortgages securing these bonds were foreclosed in the interest of the bondholders. The plan adopted by a reorganization committee, representing all but \$150,000 of bonds, eliminates more than \$2,000,000 of capitalization of the old company and reduces the fixed charges so that for the first two years it amounts to only \$17,640 and thereafter during the next four years gradually increases to \$54,440. Under the plan each \$1,000 of Boston & Worcester Street Railway Company bonds will be entitled to \$300 in reorganization bonds, \$300 in 6 per cent preferred stock, and \$400 in common stock.

It is proposed to originally issue the entire capital stock of the company, including the incorporators' shares, as common stock, with a par value of \$100 per share, and shortly thereafter to exchange \$10,000 par value of such outstanding common stock for \$10,000 par value of 7 per cent prior preference stock and to exchange \$756,000 par value of said outstanding common stock for \$756,000 par value 6 per cent preferred stock. Thus, the new company will have outstanding the securities contemplated by the reorganization plan. We will deal with the petitions for approval of exchange of stock when presented.

At the hearing the holders of nine bonds of the Framingham, Southborough & Marlborough Street Railway Company, which were underlying bonds of the Boston & Worcester Street Railway Company secured by a portion of the property formerly P.U.R.1923B.

owned by it, objected to the issuance of stock and bonds as proposed by the reorganization plan. They argued that the amount of capitalization should not be made materially greater than the price at which the property was sold at the receiver's sale, that this sale price indicated the value of its property, that the issuance of securities much in excess of this sale price might result in fraud, in that the securities might later be sold on the representation that this Department had approved their issuance, and, therefore, was of the opinion that they were well worth their face value, and that the public would be called upon to pay more in fixed charges and dividends.

[1, 2] We are not impressed with the argument that the sale price at the receiver's sale indicates the value of the property for street railway purposes. No one was in a position to very effectively bid at such a sale in competition with the reorganization committee, as they represented substantially all the bondholders who had assented to the reorganization plan and the only effect of an increased price at the receiver's sale would have been to increase the amount of money which would be available for distribution to the nonassenting bondholders who held less than 150 bonds. There was no purpose in the reorganization committee bidding higher, as this would increase the amount of cash that would have to be paid to the holders of these nonassenting bonds. The main purpose of the sale was to acquire the title and to provide funds sufficient to meet the receiver's obligations. Consequently, in our opinion the upset price fixed by the court is of little importance in determining the amount of stock and bonds which may properly be issued in capitalizing a new company which is organized for the purpose of operating the property. Our statutes provide that it shall not exceed the cost of replacing the property. We are satisfied that the capitalization proposed does not exceed this cost. The statute in no way intimates that the capital is to be in any way controlled by the purchase price at a receiver's sale. If the property can be operated successfully, it will be worth its capitalization.

[3] To permit the company to make a profit, if it is able to, based upon the proposed capital will in no way impose an unfair burden upon the public, as the public will obtain the use of P.U.R.192SB.

the property by paying a return upon the value which is not in excess of the cost of replacing it, and which is approximately \$2,000,000 less than the amount originally invested therein. We think it in the interest of the public that the property should be maintained and operated, if possible, and it is but justice to the bondholders that they be given an opportunity to recover, so long as no injustice is done to the public, the value of that which they advanced to the old company.

While there may be some possibility that someone of the public may be induced to give undue weight to the approval of this Department of the capitalization in the purchase of the company's securities, we are of the opinion that under the circumstances, that ought not to stand in the way of effecting the reorganization proposed.

[4] As the bonds to be delivered to the receiver under the decree of the court on account of the purchase price are in the possession of the reorganization committee, and an underwriting syndicate is to furnish the amount to which the nonassenting bonds will be entitled from the proceeds of the foreclosure sale, we think the delivery of first mortgage bonds of the Boston & Worcester Street Railway Company and first mortgage bonds of the Framingham, Southborough & Marlborough Street Railway Company, of a total face value of not less than (including bonds, if any, already deposited with the receiver under said decree) \$2,375,000, together with all unpaid coupons pertaining thereto (or indemnity in case of lost coupons satisfactory to the receiver) should be delivered or made available to the receiver in accordance with the foreclosure decree of the supreme judicial court, entered September 2, 1927, and the equity in all of said bonds so deposited with or made available to the receiver and the rights of the committee in the agreement with the aforesaid syndicate should be acquired by the company as a condition precedent to the issuance of stock and bonds by the company.

Accordingly, after due notice and a public hearing, it is determined by the Department that the proposed issues of capital stock and bonds are reasonable and proper, consistent with the public interest, for lawful purposes and of an amount reasonably necessary for such purposes, and it is

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Ordered, that the issue of \$1,500 common capital stock (15 incorporators' shares with a par value of \$100 each) for cash at par; the issue of \$252,000 principal amount of 7 per cent first mortgage bonds, dated November 15, 1927, and maturing November 15, 1947, and callable at face value plus interest; the issue of \$756,000 principal amount of 5 per cent reorganization bonds, dated November 15, 1927, maturing November 15, 1947, also callable at face value plus interest (with provisions for defining interest payments as above provided); the issue of \$2,024,500 common capital stock be approved as reasonable and proper for the purpose of acquiring the railway and property, including rights, locations, privileges, and franchises formerly operated by Boston & Worcester Street Railway Company and purchased by Henry B. Rising at receiver's sale on October 11, 1927, provided, however, that before any of said stock and bonds are issued, except the said 15 incorporators' shares, first mortgage bonds of the Boston & Worcester Street Railway Company and first mortgage bonds of the Framingham, Southborough & Marlborough Street Railway Company, of a total face value of not less than \$2,375,000, together with all unpaid coupons pertaining thereto (or in case of lost coupons indemnity as aforesaid), shall be delivered or made available to the receiver of the Boston & Worcester Street Railway Company, in accordance with the foreclosure decree of the supreme judicial court, entered September 2, 1927, on account of the purchase price; and the equity in all of said bonds so deposited with or made available to the receiver and the rights in the agreement with the aforesaid syndicate shall be acquired by the company, and that not less than two hundred fifty-two thousand dollars shall be paid or caused to be paid to the company by the said Henry B. Rising; and it is *further ordered*, that the said sum of not less than two hundred fifty-two thousand dollars which is to be paid to the company shall be used to discharge all the obligations of the purchaser assumed by the new company which it is obligated to pay, and any balance shall be used for working capital or other proper corporate purposes.

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MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES.

RE FRANKLIN L. HART, Doing Business as Hart Motor Coach Company.

[D. P. U. 2468.]

Certificates of convenience and necessity — Opposition of local authorities.

The Commission should not grant a license for the operation of motor vehicles for hire through a town against the express wishes of the local authorities unless there are impelling circumstances that require such action.

(HARDY, Commissioner, dissents.)

[December 16, 1927.]

PETITION for a certificate of public convenience and necessity for the operation of motor vehicles for transportation of passengers; dismissed.

By the **Commission**: The petitioner requests a certificate of public convenience and necessity for the operation of motor vehicles for hire between Winchendon and Cambridge and that the Department grant him a license to operate such motor vehicles through the city of Fitchburg and the town of Ayer.

After due notice, public hearings were held, at which the petitioner appeared and other parties voiced opposition to the granting of the petition.

Prior to the last public hearing the city of Fitchburg granted the petitioner a license, but the town of Ayer has not as yet granted him a license to operate. The Boston & Maine Railroad now operates motor vehicles for hire over this same route and there are other persons or companies operating locally over parts of the route.

We feel that we should not grant a license for the operation of motor vehicles for hire through a city or town against the express wishes of the local authorities unless there are impelling circumstances that require such action on our part. Taking into consideration the number of probable passengers on this route and the fact that there are other busses being operated over the whole and over parts of the route, we are of the opinion that there

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are not at this time such impelling circumstances as to warrant us in overriding the licensing authorities of the town of Ayer.

Accordingly, we are of the opinion that the petition should be dismissed, and it is so ordered.

Hardy, Commissioner, dissenting: The Hart Motor Coach Company is petitioner for a certificate of public convenience and necessity for the operation of motor vehicles for the transportation of passengers for hire between Winchendon and Cambridge. Such operation would pass through two cities and fourteen towns. The company at the time of the last hearing upon the petition had obtained licenses in all the municipalities except the town of Ayer, and has asked the Commission to act as the licensing authority for this town under the law applicable thereto.

The petitioner now holds a certificate to operate motor busses between Winchendon and Williamstown. From Boston to Williamstown, at various places, bus transportation is furnished by several operating companies, and rail service is also provided through the territory. The Hart Motor Coach Company is operating over the route petitioned for as an interstate carrier. Prior to the decision of our supreme judicial court, in *Boston & Maine Railroad v. Hart*, 254 Mass. 253, 150 N. E. 212, the company operated over this route both as an interstate and intrastate carrier. During this period it furnished a service to the public that was very generally commended. In fact, at that time it was the only through bus service. Following said decision it filed application for licenses in each of the municipalities through which it wished to operate. After a time, and in the face of opposition from certain carriers, the company finally secured licenses from the two cities and in all of the towns except Ayer.

I subscribe to the doctrine that the Commission should, as a rule, proceed slowly in overruling the action of local authorities. They have, or should have, such a knowledge of local conditions as to enable them to decide public questions and policies affecting the interest of their particular locality. In this case, however, all of the municipalities except this one town decided that the needs of the public in this territory required additional trans-
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portation facilities. Under these conditions I do not feel that sufficient evidence has been introduced to satisfy me that one town should prevent such territory from receiving the benefit of these facilities. It was for this purpose that a law was passed enabling the public to have a remedy applied, where its reasonable interest seemed so to require.

The Hart Motor Coach Company is one of the pioneers in the bus field. It has received continuous opposition from other carriers who were not operating busses when Hart began his bus activities. As a matter of fact the railroads and railways for a time seemed not to have anticipated transportation developments and public demands, and were not alive to the situation then rapidly developing. They did not apparently realize that transportation was in another period of transition; this time in part from rails to rubber. The proprietor of the Hart Motor Coach Company early comprehended the situation and has proceeded as fast as he could under the conditions that have obtained. He has furnished a satisfactory service. The issue here is, does public convenience and necessity require the granting of a certificate to this petitioner? From testimony at hand and petitions on file, it seems to me that this company would furnish a service of such a public benefit that the want of it is a public inconvenience. Upon all the testimony and under all the conditions, I am of the opinion that a certificate, embodying reasonable restrictions, should issue to the petitioner.

MISSOURI PUBLIC SERVICE COMMISSION.

RE R. A. McCARTNEY et al.

[Case No. 5378.]

Certificates of convenience and necessity — Operation in good faith prior to regulation.

1. A certificate of convenience and necessity was awarded as a matter of right, in the absence of evidence overcoming the legal presumption of public convenience and necessity, to two applicants who proved actual operation in good faith and the rendition of satisfactory and dependable service by motor vehicles prior to the effective date of the Motor Bus Regulation Act (1927, § 11), p. 530.

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Certificates of convenience and necessity — Restriction of joint trade name in the absence of partnership.

2. Two applicants not having a partnership or corporate relation between them for certificates of convenience and necessity, each owning a separate fleet of busses and operating over the same route under the joint name of "Albatross Coach Line" in accordance with a private agreement were granted certificates with the restriction that in the absence of a partnership the practice of using a joint name should be discontinued as misleading to the public and the coaches so painted to distinguish the separate operators, p. 531.

[November 30, 1927.]

APPLICATIONS of two operators of motor utilities over a joint route for certificates of convenience and necessity; both certificates granted with restrictions.

Ing, Commissioner: On August 3, 1927, R. A. McCartney and Coin Combs filed with the Commission a joint application for a certificate of convenience and necessity to operate as motor carriers between the cities of Springfield and Joplin, Missouri.

The application alleges that the principal office and place of business of R. A. McCartney is 113 East Fourth street, Joplin, Missouri; that the principal office and place of business of Coin Combs is 212 North Campbell Street in the city of Springfield, Missouri; that the property owned by R. A. McCartney is: One 21-passenger Graham parlor bus, two 18-passenger Studebaker parlor busses, one 7-passenger Studebaker sedan, one 18-passenger White sedan, and one Studebaker service car; that the property owned by Coin Combs is: One 18-passenger White parlor bus, one 18-passenger Studebaker parlor bus, one 20-passenger Fargoel parlor bus, one 7-passenger Studebaker sedan, and one Cadillac service car, and that all of said property is in good condition.

The application further alleges that R. A. McCartney and Coin Combs have been since April 20, 1923, engaged in rendering motor bus service over the route described in the application from Joplin to Springfield, Missouri. The application alleges that the time schedule is so arranged that it conflicts in only a very few instances with the regular train schedules along said route, it being the purpose of applicants to so arrange their schedule. P.U.R.1928B.

ule as to give the traveling public at all times a motor bus service that is needed and desired.

A protest was filed by the Missouri Pacific Railroad Company, which in substance alleges that it and other steam railroad companies have for many years operated, and now operate, lines of railroad between Springfield and Joplin, and other parts of the state, and have aided materially in building up the country between said cities and other territory in the state of Missouri; that it has not only aided in building up the country in the state of Missouri by furnishing adequate transportation service, but that it is one of the large taxpayers of the state, having paid in taxes to the state in the year 1926, the sum of \$726,523.97; that it had on its payrolls in the state of Missouri in the year 1926 an average of 14,600 employees, and paid in salaries and wages over \$20,000,000 a large portion of which was expended in the state of Missouri.

The protestant further alleges that the steam railroads furnish adequate, sufficient, dependable and satisfactory transportation facilities for the carriage by rail of passengers, baggage, mail, express, and freight, between Springfield and Joplin, Missouri; that said railroads are capable of handling a much greater volume of traffic than they are now carrying; that since the completion of improved highways in the state of Missouri the number of passengers handled has been greatly diminished; that the revenue derived by the protestant for the transportation of passengers is not sufficient to justify the maintenance and operation of said trains; that the granting of a certificate of convenience and necessity to the applicant will result in diverting from said steam railroad carriers a still greater number of passengers and thereby tend still further to burden said carriers in their effort to continue the operation of said trains, and that the service of the applicant is not necessary for serving the public convenience and necessity, but that same is already efficiently and adequately served by the steam railroad carriers aforesaid.

Protestant further alleges that the only reason the applicant can hope to compete with the protestant and other steam railroad carriers for through traffic is because it proposes fares and charges which are unreasonably low and inadequate, and that the author-P.U.R.1928B.

ization of said low fares and charges proposed by the applicant is protested because, the protestant says, they would create undue and unreasonable discrimination and unfair competition, which would result disastrously to the steam railroad carriers.

This case was heard by the Commission at the Commission's hearing room at Jefferson City, Missouri, on the 14th day of September, 1927. In addition to the protest of the Missouri Pacific Railroad Company appearance for the St. Louis-San Francisco Railway Company and the Pickwick Stage Lines was entered and each was represented by counsel and participated in the hearing.

Facts:

R. A. McCartney resides at Joplin, Missouri, and Coin Combs at Springfield, Missouri. The testimony shows that these applicants are not partners, but that each owns certain busses and that each operates individually the busses he owns. Mr. McCartney owns and operates four busses on the route between Springfield and Joplin, and pays all the expense of such operation, and receives all of the revenue derived therefrom. Coin Combs owns and operates three busses, and he also bears all the expense of operating these busses and receives all the revenue derived from their operations.

On the 19th day of July, 1927, these two operators entered into what they term an agreement, the substance of which is a statement of their understanding of the business relations between them so far as bus operation is concerned. This statement states that they have for sometime been engaged in operating a bus line between Joplin and Springfield, Missouri, known as the "Albatross Coach Line;" that regular daily schedules are maintained by each of said parties; that each use the same terminals and depots in Joplin and Springfield; that each of said parties recognize and honor the transportation on each other's busses; that in all respects they work and co-operate together in the transportation of passengers; that each of said parties own, operate, and maintain their own busses and equipment, pay their own employees, and all other expenses connected with the operation of their busses; that neither party has any financial interest or title in P.U.R.1928B.

the busses, equipment, or property of the other, and that there is no division of profits or losses between them. It is further stated in said "agreement" that the schedule of time of the operation of busses owned by Coin Combs at Springfield is from 12 o'clock midnight to 12 o'clock noon; by R. A. McCartney from 12 o'clock noon to 12 o'clock midnight; at Joplin by R. A. McCartney from 12 o'clock midnight to 12 o'clock noon, and by Coin Combs from 12 o'clock noon to 12 o'clock midnight.

The route of applicants passes through the cities of Webb City, Carterville, Carthage, Avilla, and Springfield, the total mileage between Springfield and Joplin being 79.18 miles.

Mr. McCartney maintains a garage at Joplin and Mr. Combs maintains one at Springfield. They are used especially for taking care of the busses used on the route.

Mr. McCartney began the operation of a bus line between Springfield and Joplin in April, 1923, and Coin Combs engaged in operating busses over the same line in the latter part of the year 1923 or the first part of 1924. Each of them has continued to render bus service over this line from the inception of their operations to the time of the hearing. Each carrier maintains extra equipment at Springfield and Joplin, so that in emergencies or delay occasioned by accident the delay would not be for a great length of time. There is no other bus service between Joplin and Springfield.

There is painted along the side and near the top of each coach the words "Albatross Coach Line." This appears on the busses belonging to both Mr. McCartney and Mr. Combs, and each refers to the bus operations as the operations of the Albatross Coach Line.

A number of witnesses testified on behalf of applicants that the service now being rendered, and which has for sometime been rendered by the applicants, is dependable and reliable, and that there is a demand and necessity for the service.

The testimony shows that there is an interurban street car line between the cities of Joplin and Carthage, passing through Webb City, which furnishes hourly service from Joplin to Carthage and 30-minute service from Joplin to Webb City; that the Missouri Pacific Railroad Company operates one pas-

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senger train daily between Springfield and Joplin and three passenger trains daily between Joplin and Carthage, and that the St. Louis-San Francisco Railway Company operates four passenger trains daily between Springfield and Joplin.

According to certificates furnished the Commission, the mileage traversed by the applicants is as follows: Over State Route 57 and U. S. Routes 71 and 66, 67.204 miles; over the county road lying between Sections 13 and 24, Township 28, Range 33, Jasper county, .50 miles; within the city limits of the city of Springfield, 1.82 miles; in the city of Carthage, 1.997 miles; in the city of Joplin, 1.706 miles; in the city of Webb City, 1.76 miles, and in the city of Cartersville, 1.6 miles.

Applicant McCartney filed with the Commission an exhibit purporting to show the financial condition of said applicant. This exhibit places his assets at \$44,750; liabilities at \$11,790, leaving his net worth at \$32,960.

A financial statement was also filed by Coin Combs which places his assets at \$36,960; liabilities \$9,950; net worth \$27,000. The applicants also filed with the Commission exhibits showing the time schedule and schedule of fares of the busses of both applicants.

Conclusions:

[1] In order to determine whether or not the applicants are entitled to a certificate of convenience and necessity the Commission must take into consideration the facts developed at the hearing, and the law as contained in the Motor Bus Regulation Act of 1927. Section 11 of said motor bus act provides as follows:

"Every motor carrier actually operating in good faith, rendering satisfactory and dependable service by motor vehicles that come under the provisions of this act on the first day of December, 1926, shall be presumed to be necessary to public convenience, and such motor carriers shall, in the absence of evidence overcoming such presumption, receive a certificate for routes established by them."

The testimony in this case shows that the applicants, on the first day of December, 1926, were actually operating in good
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faith, rendering satisfactory and dependable service by motor vehicles. That fact alone, according to the above quoted section, creates the presumption that the service rendered by them is necessary to public convenience, and entitles them to a certificate of convenience and necessity for the route established by them, in the absence of evidence overcoming such legal presumption, and the Commission finds that such legal presumption has not been overcome.

The purported agreement between Mr. McCartney and Mr. Combs appears to be a statement of the understanding of each party to the agreement as to the manner in which each should recognize the other, and so long as same does not operate detrimental to the public interest it will not be interfered with by this Commission.

[2] The Commission is of the opinion that either Mr. McCartney or Mr. Combs should discontinue the use of the words "Albatross Coach Line" on their busses. If a partnership existed between Mr. McCartney and Mr. Combs, and if they had adopted "Albatross Coach Line" as the name of their company, there could be no objection, but since they are not a partnership there must be some way in which to distinguish the cars and busses of Mr. Combs from the cars and busses of Mr. McCartney and vice versa. At the present time the words "Albatross Coach Line" mean nothing, but if permitted to be applied to the busses of both applicants their use might be misleading to the public. It appears that since Mr. McCartney has other bus interests which he calls "Albatross Coach Line," it would be best for Mr. Combs to change the wording on his busses to something that will indicate that they are not the property of Mr. McCartney and for Mr. McCartney to continue to call his the Albatross Coach Line.

After a careful consideration of all the facts in this case and the law governing motor bus operations in this state, the Commission is of the opinion that a certificate of convenience and necessity should be granted the applicants, and that they be authorized to operate separately and independently of each other over the line between Springfield and Joplin, and that Mr. Combs abandon the use of the designation of his busses and P.U.R.1928B.

cars as "Albatross Coach Line" and adopt some other designation.

An order in accordance with the views herein expressed will be issued.

Brown, Chairman, Ing. Porter, Commissioners, concur; Calfee, Hutchison, Commissioners, absent.

ORDER.

This case being at issue upon application and answer on file, and having been duly heard and submitted by the parties, and the Commission having on the date hereof issued a report containing its findings of fact and conclusions thereon,

Now, after due deliberation, it is,

Ordered: 1. That R. A. McCartney be and he is hereby granted a certificate of convenience and necessity to operate as a motor carrier of passengers for hire between the cities of Springfield and Joplin, Missouri, over the route designated in the application herein, and that he shall file with the Commission the time schedule and schedule of rates as set out in the application and evidence in this cause as being the schedules desired by him.

Ordered: 2. That Coin Combs be and he is hereby granted a certificate of convenience and necessity to operate as a motor carrier of passengers for hire between the cities of Springfield and Joplin, Missouri, over the route designated in the application herein, and that he shall file with the Commission the time schedule and schedule of rates as set out in the application and evidence in this cause as being the schedules desired by him.

Ordered: 3. That Coin Combs be and he is hereby directed to abandon and discontinue the use of the words "Albatross Coach Line" on his busses and cars herein referred to and to adopt in lieu thereof some other designation that will distinguish his cars and busses from those being operated by R. A. McCartney.

Ordered: 4. That the mileage traversed by the applicant over the route herein is found to be as follows: Over State Route 57 and U. S. Routes 71 and 66, 67.204 miles; over the county road in Jasper county, .50 miles; within the city limits of the city of Springfield, 1.82 miles; in the city of Carthage, 1.997 miles; P.U.R.1928B.

in the city of Joplin, 1.706 miles; in the city of Webb City, 1.76 miles and in the city of Carterville, 1.6 miles.

Ordered: 5. That this order be in full force and effect ten days after the date hereof, and that the secretary of this Commission shall serve certified copies of this report and order on the parties interested herein, and that Coin Combs and R. A. McCartney shall notify the Commission, on or before the effective date of this order, whether the terms of this order are accepted and will be obeyed.

NEBRASKA STATE RAILWAY COMMISSION.

RE LINCOLN TELEPHONE & TELEGRAPH COMPANY.

[Application No. 7021.]

Rates — Cost of improved service — Consent of subscribers — Telephones.

1. An increase of rates was granted to a telephone utility where the reconstruction of the system from grounded to metallic lines was made necessary by field conditions and resulting poor service, the subscribers having by signed petition approved of such readjustment, p. 534.

Commission — Jurisdiction over managerial questions — Employees' wages — Telephones.

2. The Commission has no jurisdiction over wages paid by public utilities to employees except as such wages might be unreasonably high and unduly burdensome upon the rate paying public; but a telephone company was urged to increase wages to an exceptionally efficient and popular operator where public sentiment insisted upon more adequate compensation, p. 535.

[December 23, 1927.]

APPLICATION of telephone utility for increase of rates and reconstruction of service; approved.

Curtiss, Commissioner: Applicant herein, Lincoln Telephone & Telegraph Company, furnishes telephone service at Murray, Nebraska, and territory adjacent thereto. It serves 199 subscribers, 147 of whom are rural, the remainder being town, business, and residence. Present service is of the magneto grounded type. Applicant proposes to reconstruct its Murray properties P.U.R.1928B.

so that it can furnish subscribers of this exchange with full metallic service. This application requests authority to revise its schedule of rates for service at this exchange, the changed schedule to be effective at such time as applicant is able to render metallic service. Hearing upon the application was held at Murray, on Friday, November 18th.

[1] Applicant states that it is confronted with a present reconstruction program at its Murray exchange, whether it remain grounded, or be made metallic. In recent years electric transmission lines of high voltage have been constructed in the territory paralleling telephone lines. Such construction has resulted in inductive interference with the grounded lines of applicant, making the service highly unsatisfactory to Murray subscribers. A petition circulated by applicant requesting it to make the change to metallic service and approving the rate schedule herein proposed, was quite generally signed by subscribers affected. The Commission is familiar with the highly unsatisfactory telephone service which follows the paralleling of a grounded telephone line by a transmission line of high voltage. The proposal of applicant to make its grounded lines metallic, appears to be the practical way of restoring the service to a proper standard.

Applicant presented Exhibit A containing among other things, a statement of actual earnings and expenses of this exchange since 1922, and estimated annual earnings and expenses under the proposed rate schedule, with the exchange metallic. This statement shows that in the years 1922 and 1926, applicant had available for return on its investment, a very meagre amount. In all of the other years, the exchange failed to produce sufficient revenue to pay actual operating expenses. The estimate showed total annual exchange revenue under the rate schedule proposed, of \$4,833.07; total expenditures exclusive of fair return of \$4,029.97, leaving \$803.10 available for return upon the investment. This estimate of receipts and expenditures under the proposed schedule, the exchange being metallic, is undoubtedly approximately correct, being based upon six years of actual experience of the exchange.

The investment or book cost of the properties as reflected by the company's books of account, is \$15,489.98. In changing P.U.R.1928B.

from grounded to common battery service, it is estimated that the net investment in the exchange will be increased about three thousand three hundred dollars, making a total investment or original cost, after the exchange is metallic, of slightly less than nineteen thousand dollars. On a basis of estimated revenue available for return, applicant would earn slightly in excess of 4 per cent on its alleged book cost.

[2] Subscribers offered no objection to the proposed change from grounded to metallic service. In fact, they indicated their approval of the change. Neither did they protest against the rate schedule proposed. They did, however, insist that if the rates be increased, consideration be given to the salary paid the local operator, the thought being that her present wage is insufficient. At the present time the operator's salary is \$85 per month. She resides in a building owned by applicant, jointly used as telephone office and her residence. She furnishes heat and light for the premises, is responsible for twenty-four hour service at the switchboard, keeps the company's local records, and makes collections. The service which is being given by her was highly praised. It was contended that after necessary expenses were deducted from her salary, including the salary which she must of necessity pay a relief operator, the wage which she received was entirely inadequate for the splendid service which she was rendering the public. This being a matter of common knowledge, the telephone using public were extremely reluctant to use the telephone during hours of the night because of disturbing the operator in what they knew to be a much needed rest. If a more generous wage were paid, additional help could be secured by the operator; she would have more opportunity to rest during the day, and the subscriber, as a result, would have less reluctance in the use of telephone service during the night hours. So it was contended by the subscribers who appeared at the hearing.

Such a tribute to a faithful public utility employee is unusual, especially at a time of application for increased rates, when the inclination is perhaps more likely to be one of general fault-finding.

This Commission has no jurisdiction over wages paid by pub-
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lie utilities to employees, except as such wages might be unreasonably high and unduly burdensome upon the rate-paying public. Nevertheless in the case at hand, it urges the serious consideration of applicant to the contention of these subscribers, and expresses the hope that arrangements may be made which will be agreeable and satisfactory to all parties of interest.

Applicant has shown the necessity for changing from grounded to metallic service. The rates which it proposed are not unreasonable.

PENNSYLVANIA PUBLIC SERVICE COMMISSION.

CITY OF ERIE et al.

v.

MUTUAL TELEPHONE COMPANY.

[Complaint Docket No. 6791.]

Valuation — Necessity for depreciation deduction — Telephones.

1. Reductions should always be made for property depreciation in finding value for rate determinations, p. 537.

Valuation — Method for arriving at going value — Telephones.

2. Going concern value should not be on a percentage basis but should be determined only by the consideration of operating conditions in a particular case, p. 539.

Return — Increased operating expenses following consolidation — Telephones.

3. An increase in operating expenses following a consolidation was allowed on the theory that a telephone company operating without competition was required to render a higher and more expensive standard of service than formerly, p. 540.

Return — Percentage allowed — Telephones.

4. An increase of telephone rates was allowed to produce a return of 7 per cent, p. 541.

[January 4, 1928.]

COMPLAINT by a city and a group of business telephone subscribers against increased rates; complaint dismissed.

By the Commission: This is a complaint by the city of Erie, in which some twenty manufacturing corporations were, by or-
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der of the Commission, permitted to intervene, against an increase of rates for telephone service in said city, as set forth in respondent's tariff P. S. C. Pa. No. 6, effective April 1, 1926, alleging that said rates are unjust, unreasonable, and excessive. Complaint having been entered before the effective date of the tariff, the burden of proof rests on respondent.

Respondent was organized in 1898 to furnish telephone service to the city of Erie and vicinity. In this territory the Bell Telephone Company of Pennsylvania also furnished service,—the two plants not being connected. During the latter part of 1925 respondent negotiated with the Bell Telephone Company for the purchase of certain property in the city and county of Erie for the purpose of eliminating duplication of service with the Bell Company. Such purchase and merger was consummated April 1, 1926. By the purchase of the Bell property, the Mutual Company, which had previously some 19,000 stations, acquired approximately 3,000 additional stations, most of which were in various towns in Erie county outside the city of Erie in territory not previously occupied by respondent. Simultaneously with the taking over of the Bell telephones acquired, respondent put into effect a rate schedule making substantial increases in its charges for telephone service in the city of Erie, which are the rates under attack.

An inventory and appraisal, as of August 31, 1926, of the telephone company's property, made by the engineers of respondent, was offered in evidence. Complainant based its estimates substantially upon respondent's inventory, which included physical property, miscellaneous investments, working capital, cost of financing, and going concern value. The appraisal of the respondent resulted in a reproduction cost new estimate of \$5,714,060, and less depreciation \$5,023,494. The complainant's appraisal was reproduction cost new \$4,823,827, and less depreciation \$4,251,828. These figures of the complainant did not include miscellaneous investments or any allowance for cost of financing.

[1] Respondent contends that the reproduction cost new of the property should be accepted for rate-making purposes, while complainant urges the use of reproduction cost new less depreciation. P.U.R.1928B.

ciation. In considering the estimates of reproduction cost new that were submitted by the parties, the Commission sustains the contention of complainants in this respect. It adheres to the principle which it has always heretofore followed in considering that reductions should be made for property depreciations in all estimates or findings of value for rate determinations.

Respondent includes in its estimates the Ninth Street exchange building to the amount of \$99,546, which complainant excludes as property not used or useful. The Commission agrees with complainant that this item of property is not substantially used or presently useful. Making this deduction from the direct construction costs, it appears that the parties differ by less than \$9,000, which amount is distributed over numerous small items and may be considered negligible.

The parties are in accord that an amount equal to 16.77 per cent of the direct construction costs should be taken for indirect construction costs or overheads. While the Commission does not accept the percentage basis as the proper method of determining the amount involved, its studies do not disagree with the totals thus arrived at by respondent and complainant.

Under net additions to plant facilities, respondent sets forth the sum of \$657,444 as representing the additions from October 1, 1925 to August 31, 1926. Respondent argues that the Commission should consider the capital structure as of this latter date. In advancing an estimate of \$405,496 complainant does not dispute the correctness of respondent's figures, but urges that consideration should properly rest on the average plant in service during 1926. In the light of all the attending circumstances in this case the Commission will accept respondent's capital structure as of August 31, 1926.

For miscellaneous investments, respondent claims the amount of \$21,197 new and \$15,131 depreciated. Complainant omits this item as nonoperating property. The record establishes this investment to be a garage on French street used for operating purposes, but with also a dwelling not used in respondent's operation. The record does not provide the Commission with a basis for a possible allocation, but as the amount involved is so small P.U.R.1928B.

as to be inconsiderable, the item is allowed, as depreciated, subject to a finding hereinafter made.

In considering working capital, the Commission finds the sum of \$190,000 to be reasonable and necessary to enable respondent to adequately care for the operating conditions of the future.

Respondent claims the amount of \$339,531, or $7\frac{1}{2}$ per cent, for cost of financing. It appears that this percentage was chosen because this Commission, in another rate proceeding, once found such a percentage to be fair and reasonable. The essential characteristics of the two cases are, however, entirely different. Complainant does not include in its estimate a specific amount for this item, but does mention 5 per cent. The Commission will allow \$245,000, which in its judgment, under the circumstances in this case, is a justifiable amount for this item.

[2] Respondent's estimates include the amount of \$407,061 for going concern value. Complainant estimates this item to be not more than \$340,000. In effect, both parties arrived at their estimates by applying a percentage to the reproduction cost estimates. The Commission will not accept such a method as the proper procedure for arriving at this value. The going concern value of any public utility, when such value exists, must be determined from the circumstances of the particular case. From a consideration of the character of respondent's plant and a study of its operations, together with the advantages to the public derived from the recent consolidation, the Commission finds that respondent's plant has a going concern value of \$300,000.

Respondent offered testimony as to the total value of its property reproduced new on a 10-year basis (October, 1915—October, 1925), equivalent to the sum of \$5,314,474 and on a 5-year basis (October, 1920—October, 1925) equivalent to the sum of \$5,653,629.

Taking the record and all of the facts and circumstances of this case into consideration, and the elements of value as defined in the Public Service Company Law, the Commission finds and determines the present fair value of respondent's property to be \$4,825,000.

With respect to revenues, the parties agree that the sum of \$1,018,463 is a fair estimate of operating revenues, for a full P.U.R.1928B.

year's performance, under the rates under consideration. This amount is in substantial accord with the actual experience later obtained. Both parties also included in their exhibits the added amount of \$27,105 which revenue, however, the Commission finds should more properly be allocated to nonoperating activities of the respondent. Therefore, this amount is disallowed, excepting an item of \$980 which is derived from the dwelling and garage on the aforesaid French street property. Adding this amount to the agreed on estimate of \$1,018,463, the Commission finds that the total revenues of the company for the purpose of this proceeding are \$1,019,443.

Considerable testimony was offered on fair annual operating expense. Complainant based certain of its estimates on average performance prior to the consolidation, while respondent, in claiming \$548,762, contends that, with the exception of taxes, its 1926 operating costs are representative.

[3] The operating expenses of the respondent, after the consolidation, cannot properly or accurately be estimated from expenditures made during the prior years. The Commission recognizes that respondent, now operating without competition, is expected and is required to render a higher standard of service than formerly, and that such improved service requires additional expenditures. Respondent must be financially able to meet this obligation. Complaints from subscribers must be properly and thoroughly investigated and respondent must establish and maintain satisfactory public relations with its patrons. It may be that the operating cost for 1925 and 1926 contain certain elements incident to the consolidation which will not annually re-occur, but the amount of such expenditures, if they exist, was not convincingly established. Moreover, it is not clear that the improved character of service will not entail other expenditures of at least equal amounts. Accordingly, the Commission accepts the respondent's estimates for annual operating expenses, exclusive of annual depreciation, in the amount of \$548,762.

For depreciation expense, respondent claims the amount of \$189,492 and complainant concedes \$128,193. From a review of the evidence, and giving consideration to the amount of ac-P.U.R.1928B.

crued depreciation admitted to be existent in the plant, the Commission finds a fair allowance to be \$150,000 per annum.

[4] The Commission will allow a 7 per cent rate of return upon the fair valuation found, which is equivalent to \$337,750 per annum. Adding to this sum the allowed operating costs of \$548,762 and the annual depreciation allowance of \$150,000, there is deduced a total allowable revenue of \$1,036,512, which is approximately \$17,000 in excess of the estimated revenue to be derived from the rates complained against.

For the purpose of showing that the rates against which complaint is made are on a parity with rates charged in other communities under comparable circumstances, respondent presented an informative statement which sets forth the rates charged in a number of comparable communities. In Erie, with a population of 125,000, the rate for a single party business telephone is \$8 per month. Scranton, with 140,000 inhabitants and Wilmington with 114,000 are also charged this rate. Trenton, with 119,000; Spokane, with 105,000; Albany, with 114,000; and Salt Lake City, with 127,000; appear to support a rate which has \$8.50 per month for this kind of service.

Upon a consideration of all of the evidence, the Commission finds and determines that the rates contained in the tariffs complained against are not unjust, unreasonable, or excessive. Therefore, the complaint will be dismissed, and an order will issue accordingly.

CALIFORNIA RAILROAD COMMISSION.

RE GORE BROTHERS, INCORPORATED.

[Decision No. 18981, Application No. 13753.]

Service — Abandonment — Prior illegal operation — Impure water supply — Financial loss.

A water utility operating at an increasing loss was permitted to discontinue service notwithstanding the fact that previous operation had been conducted without Commission authority, where the supply was shown to be unfit for human consumption and the subscribers had access to a purer supply.

[November 3, 1927.]

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APPLICATION of a water utility to discontinue service; abandonment of service permitted.

Appearances: Schweitzer and Hutton, by Frank S. Hutton and F. C. Stevens, for applicant.

By the **Commission**: In the above entitled proceeding, Gore Bros., Inc., whose principal business is the subdivision and sale of real properties, applies to this Commission for authority to discontinue the operation of its water system supplying water for domestic purposes to certain consumers residing in Tract No. 5644, in Los Angeles county. The application alleges in effect that it is a public utility furnishing water for compensation to eleven consumers at the present time; that the system was installed in 1923 to provide temporary water service only until such time as a permanent supply could be obtained; and that such supply is now available from the municipal water system of the city of Los Angeles, which now has its water mains in the streets in front of each and every lot in the tract served. It is further alleged that the city board of health has found the water supply to be polluted and unfit for human consumption and demands that a safe and proper water supply be obtained without delay; wherefore, applicant requests the Railroad Commission to grant it permission to discontinue its water service and abandon its well and system.

A public hearing in this matter was held before examiner Williams at Los Angeles, after all interested parties had been duly notified and given an opportunity to appear and be heard.

This water system was originally installed by applicant to provide a temporary water supply to aid in the sale of its lots in Tract No. 5644, in Los Angeles county. The water is obtained from a well which is only 40 feet deep and, as the terrain in the general vicinity is comparatively low and contains a great number of cesspools, the contamination of the water is inevitable. The testimony of H. H. Mathieson, sanitary engineer for the Los Angeles City Board of Health, indicates that the present water supply is in a deplorable condition, being highly polluted and wholly unsafe for domestic use. At the present time, there are eleven consumers dependent upon this system for water service.

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By reason of the unsafe condition of the water supplied by applicant, a few of the consumers formerly receiving water from this system have discontinued its use and are now obtaining water from the mains of the Los Angeles municipal water works which now has its mains throughout this tract. However, in view of the promises of Gore Bros., Inc., in marketing its lots that there was already installed an adequate water system, the remaining consumers do not consider it fair that they should now be required to stand the expense of paying 80 cents per front foot and \$15 for a meter connection, which is required by the city to obtain service from its mains. These consumers contend that the subdivider, Gore Bros., Inc., should pay for all costs required to receive service from the city system. Unquestionably, these consumers have been imposed upon in the matter of water supply. The system installed by applicant is admittedly temporary and of misfit construction and was never at any time seriously intended to be a proper water supply for the community served. Gore Bros., Inc., has from the start operated illegally, never having applied for or received from this Commission a certificate of public convenience and necessity to operate a public utility water works, although it is now willing enough to apply in a legal manner to be relieved of the responsibilities of a public utility nature which it has nevertheless incurred by its distribution of water for compensation. Although this Commission cannot too strongly condemn the inconsiderate operating methods of applicant in this instance, yet the evidence shows that this system is not now being operated, and probably could not be operated, at other than a financial loss. In view of the fact that the applicant's water supply has been condemned as unfit for human consumption and that the costs of securing a safe and potable water supply will increase the present financial loss, and as other water is readily available from a reliable source, it appears that the authority requested should be granted.

ORDER.

Gore Bros., Inc., operating a public utility water system supplying certain consumers in Tract No. 5644, in Los Angeles P.U.R.1928B.

county, having made application to the Railroad Commission for authority to discontinue its public utility service in said tract, a public hearing having been held thereon, the matter having been duly submitted and the Commission being now fully advised in the premises;

It is hereby *ordered*, that Gore Bros., Inc., be and it is hereby authorized to discontinue, on or after the first day of November, 1927, the service of water to all its consumers in Tract No. 5644, in Los Angeles county, upon the following terms and conditions:

1. Gore Bros., Inc., within ten days from the date of this order shall notify each of its consumers, in writing, of its intention to discontinue water service on or after the first day of November, 1927.

2. That, within ten days after such notice has been given, applicant shall file with this Commission a certified statement to the effect that such notice has been duly given.

For all other purposes, the effective date of this order shall be twenty days from and after the date hereof.

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NEW JERSEY BOARD OF PUBLIC UTILITY COMMISSIONERS.

RE COAST CITIES RAILWAY COMPANY et al.

Security issues — Chattel mortgages — Indemnity for liability under conditional sales contract.

A chattel mortgage upon certain motor busses was allowed in favor of a power utility which had paid the purchase price of such busses in order to release them from a conditional sales contract to permit the sale of the property by the motor bus company to another corporation.

[December 6, 1927.]

APPLICATION of a street railway company for leave to buy and of a motor utility company for leave to sell property, franchises, and equipment of the latter to the former; on rehearing chattel mortgage on busses approved.

Appearance: B. R. Tuttle for the petitioner.

This matter is before the Board upon application for rehearing.

By the **Board**: In the decision filed by the Board dated October 6, 1927, it was determined that the proposed sale of the property, privileges, and franchises would be approved, but the request to approve a chattel mortgage to be made by the transportation company to the Utilities Power & Light Corporation in the sum of \$190,000 was denied upon the ground that the Utilities Power & Light Corporation was an ordinary creditor in said sum and no proof was offered to show why it should be made a secured creditor upon the transfer.

The testimony taken upon rehearing indicates that in all of the conditional sales contracts for the sale of busses by the Yellow Coach Manufacturing Company, the Utilities Power & Light Corporation was a joint purchaser with the Atlantic Coast Transportation Company. The testimony indicates that this was required because at the time of the acquisition of the busses the Atlantic Coast Transportation Company was a new corporation without definite credit and the purchase of the busses from the Yellow Coach Manufacturing Company had to be financed by the Utilities Power & Light Corporation. That company, therefore, became a joint purchaser bound by all the terms and conditions of the conditional sales contracts. For the purpose, there-

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fore, of carrying out the transfer of the busses to the Coast Cities Railway Company it became necessary to pay off the balance due under the conditional sales contracts. All of the money due under the conditional sales contracts, according to the testimony, was paid by the Utilities Power & Light Corporation. Otherwise no title to the busses could have been acquired by the transportation company. Inasmuch, therefore, as the Utilities Power & Light Corporation has paid all of the purchase price of the busses to satisfy the conditional sales contracts in order to convey complete title to the transportation company, there seems to be no valid reason why they should not be secured for the money so advanced. In other words, the indebtedness was incurred to enable making the transfer of the property to the Coast Cities Railway Company. A chattel mortgage in the form submitted and in the principal amount of \$190,000, encumbering the property set forth in the original petition, will be approved.

MARYLAND COURT OF APPEALS.

MARION H. MERRYMAN

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY.

[No. 39.]

(— Md. —, 138 Atl. 324.)

Service — Water — Acceptance of service application — Time limit.

1. The acceptance by a city water utility of an application for service in which the applicant agrees to pay for the connection and all charges incident to service creates an implied contract under which the city by implication agrees to supply the water within a reasonable time thereafter, p. 554.

Service — Extent of water utility's duty to serve.

2. A municipal water utility is under a duty to consumers to supply the water impartially to all reasonably within the reach of its pipes and mains, p. 554.

Service — Water — Duty to notify consumer of requirements of service.

3. A city water utility is under an obligation to notify an applicant for service that a new main would have to be installed in order to afford him the opportunity of availing himself of the supply within a reasonable time even at increased cost, p. 555.

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Evidence — Testimony as to attempts to have water supplied — Damage suit.

4. A question as to what an applicant for water service did, upon returning from a trip to find water supply yet unfurnished, was pertinent to show what effort was made to have water supplied, p. 556.

Evidence — Denial of reception of letter concerning utility service.

5. A denial by a water consumer suing for damages for failure of supply by a city, that he has received a letter alleged to have been mailed by the city plant officials is admissible in evidence, p. 556.

Evidence — Damage suit for failure of water supply — Procedure.

6. Evidence by a city plant as to its procedure upon application for service is proper where it is being sued for damages resulting from an alleged failure to supply water, p. 556.

Evidence — Admissibility of city utility rules — Damage suit.

7. Rules of the city water department may properly be placed in evidence in a damage suit by a consumer for failure to supply water, p. 557.

[July 8, 1927.]

Suit by water consumer against the city mayor and council of Baltimore for alleged damages resulting from alleged failure to supply water through negligence of city plant; judgment for city reversed on appeal and new trial awarded.

Argued before Bond, C. J., and Pattison, Urner, Adkins, Offutt, and Parke, JJ.

Appearances: J. Purdon Wright, of Baltimore, for appellant; Charles C. Wallace, City Solicitor, and John Henry Lewin, Assistant City Solicitor, both of Baltimore (George E. Kieffner, Assistant City Solicitor, of Baltimore, on the brief), for appellee.

Pattison, J.: The appeal in this case is from a judgment for defendant's costs in a suit brought by the appellant, Marion H. Merryman, against the mayor and city council of Baltimore.

The declaration upon which the suit was brought alleged that prior to the 5th day of November, 1923, the defendant, the mayor and city council of Baltimore, had acquired, by purchase, all the property and assets of the Baltimore County Water Company, a public service corporation, which prior to such time had been engaged in supplying the residents of Towson and other vicinities of Baltimore county with water. It thereupon became the duty of said defendant, as successor to said water company, upon formal application and payment of certain pre-

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scribed connection charges, to furnish water to all owners of property in the areas through which the water mains of said water company had theretofore been laid. That the plaintiff was prior to said 5th day of November, 1923, and has ever since been the owner in fee simple of a lot of ground in Towson on the south side of Susquehanna avenue, about 100 feet east of Washington avenue, upon which he, in the fall of 1923, erected a large and substantial frame building intended to be used for residential and business purposes. That on the said 5th day of November, 1923, after the plaintiff had practically completed the erection of said building, he made formal application to the defendant corporation "to have an adequate supply of water delivered to his said premises." That some time prior to said date, "water mains had been laid in the beds of the avenues immediately adjacent to the plaintiff's said property by the aforementioned water company," which had been taken over by the defendant corporation and were then and are now in existence and used by the defendant corporation as a part of its said water system. That the plaintiff, at the time of making his application for a supply of water, was required by the defendant to pay the sum of \$16 to cover the installation charges which were paid to Charles E. Bichey, collector of water rents and licenses for the defendant, and his receipt taken therefor. That upon the plaintiff's formal application for water services and the payment of the installation charges which were exacted of him, it became the duty of the defendant corporation to "provide and lay the pipes, meter, and fixtures, etc., necessary to . . . deliver an adequate supply of water to said premises within a reasonable time thereafter." That after making the application and paying the required installation charges, he, on several occasions thereafter, notified the defendant corporation that the water had not been delivered to his premises and received promises that the matter would be attended to, but the defendant failed to deliver any water thereat, until the 13th day of July, 1925, "in consequence of which he (the plaintiff) was during all of said period, prevented from renting or making any other disposition of his said building, and the same was rendered of no use or

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value to him whatsoever, to his great loss and injury, due entirely to the failure and neglect of the defendant corporation to perform and complete its aforesaid undertaking."

To this declaration the defendant pleaded, never promised and never indebted as alleged, and issue was joined thereon. No question was raised as to the pleading.

At the trial of the case 40 exceptions were taken. At the conclusion of the whole testimony a prayer was offered by the defendant asking that the case be withdrawn from the consideration of the jury, because of a want of evidence legally sufficient to entitle the plaintiff to recover. This prayer was granted and an exception was taken to the action of the court thereon. The other exceptions were to the rulings of the court upon the evidence.

The facts as disclosed by the record are substantially these:

Marion H. Merryman, the appellant, a resident of Towson since 1903, owned his home on the southeast corner of Washington and Susquehanna avenues. He also owned a lot adjoining on the east, fronting on Susquehanna avenue.

In 1903 there was a 2-inch main laid in Washington avenue by the Baltimore County Water Company, but paid for by the appellant and one Morton. It, however, became the property of said company and passed to the appellee in its purchase of the property and assets of that company. The home of Merryman on the southeast corner of Washington and Susquehanna avenues was supplied with water from that main by means of a three-quarter inch pipe laid in Susquehanna avenue and connected with the Washington avenue main at the corner of said avenues. Immediately east of appellant's home is the lot owned by him upon which the building in this case was erected, known as No. 25 Susquehanna avenue. Next to it on the east is a printing plant, and beyond and adjoining the printing plant is a railroad depot. Both the printing plant and depot were, and had been for years, supplied with water by means of an inch pipe connected with the 2-inch main in Washington avenue and running eastwardly therefrom in Susquehanna avenue to and beyond the printing plant to a point opposite the railroad depot, where it stopped. The 2-inch main in Washington ave-
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nue, the three-quarter inch pipe by which water was supplied to the home of the appellant, and the 1-inch pipe by which water was furnished to the printing plant and railroad depot were all in existence at the time of the application made by the appellant for a supply of water for the newly erected building.

On the 5th day of November, 1923, when the building was about completed, the appellant made formal application to the appellee for water for said building and premises and paid to the appellee \$16 "for introduction of water from city main to supply premises 25 Susquehanna avenue, Towson," as stated in the receipt given therefor. The appellant at the same time signed an application in which it is said that the "water board of the city of Baltimore will make connection with the main pipe for the supply of the premises 25 Susquehanna avenue of which Marion H. Merryman is owner." And that "the undersigned owner of said premises hereby agrees to pay the water board for making the connection and all charges for the use of the water on the above-named premises, as regulated by law, until the said connection is severed by duly notifying the collector to stop the supply," etc. As stated by the appellant, about two weeks after making his application, nothing having been done, so far as he could see, towards supplying the premises with water, he went to the city hall "to hurry them up" in regard to same. He was there told that the water would be installed in about two weeks. Three or four days thereafter he saw Mr. Malkus who had been the field man of the Baltimore County Water Company and at that time working for the water department of Baltimore city, putting in meters; it was he, who in 1903, superintended the laying of the 2-inch main in Washington avenue, for the Baltimore County Water Company, from which fact he was familiar with its location in the avenue. He also superintended the work of supplying said premises with water when it was finally done in 1925. On the occasion mentioned, the appellant asked Mr. Malkus to make every effort he could to have the premises supplied with water, telling him that he could not use or rent the premises until it was done. After his conversation with Malkus, the appellant in January, 1924, went to Florida and did not return to Maryland until April or P.U.R.1928B.

May following, when he made complaint to the man who came to his home to read the meter that he had not been supplied with water for the premises No. 25 Susquehanna avenue. Later, still not having water, he on August 18th wrote Charles E. Bichey, collector of water rents, calling his attention to such fact, and concluded his letter by making a formal demand for the water previously applied for and telling of the loss suffered by him, the appellant, because of his inability to rent the property without water and that he would hold the city liable for such loss. To this letter he received the following reply:

"August 21, 1924.

"Mr. M. H. Merryman, Towson, Md.—Dear Sir: I have your communication of the 18th instant in reference to the delay in installation of water supply to your property on Susquehanna avenue, Towson.

"This is a matter that does not come under my supervision, as the work is performed by the water engineer's department. I am therefore referring your communication to Mr. J. S. Strohmeyer, Distribution Division, Wolfe and Oliver streets, for investigation and report to you.

"Yours very truly,

Chas. E. Bichey, Collector."

The appellant stated that the above was the only letter he received from the appellee or its agents in relation to the water supply asked for by him. He was asked if he had not received letters dated December 14, 1923, and March 12, 1924, from Frank J. Hablick, bureau of drafting, water department, Baltimore city, and he said he had not received either of them. He testified that after receiving Mr. Bichey's letter of August 21, 1924, he went to the office of Mr. Strohmeyer and had a talk with him, and while there Strohmeyer called up the city solicitor over the 'phone, with whom he talked. He could not hear what the city solicitor said to him, but could hear what Strohmeyer said, and after talking some time, Strohmeyer suggested:

"Had not we better get into an agreement with Mr. Merryman?"

At the close of his conversation over the 'phone, he said to the appellant:

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"I will have to draw up a paper here to have you sign off that you are not coming back upon the city for any damages, and I said to him 'I am surprised at your asking such a question;' he said very little more, and so I got up and went on out."

It was not until July, 1925, that water was supplied by the city to the premises No. 25 Susquehanna avenue, at which time the city laid a 6-inch main on Susquehanna avenue, with which the pipe that supplied the water to the premises of the appellant was connected. Evidence was also offered by the appellant showing the rental value of the house and premises and the loss sustained by him by his inability to rent the same on account of the failure of the city to supply the premises with water. After it was supplied with water, he on the 28th day of January, 1926, rented the property for one year commencing the 1st day of February, 1926, at and for the sum of \$65 per month.

It is contended by the appellee that the payment of the \$16 by the appellant to the appellee and his application made at the same time for a supply of water to the premises owned by him was an application for "making connection with the main pipe" in Susquehanna avenue, the street adjacent to said premises, provided there was an available main in said avenue. As construed by the appellee, no pipe less than two inches is a main with which it is required to make such connection, and as there was not a pipe of that size in Susquehanna avenue they were "excused at law because of impossibility or because of mutual mistake of a material fact, the subject-matter of the supposed contract; namely, an available main in Susquehanna avenue was not in existence," or, as stated by the appellee in its brief:

"It may properly be said to have constituted an offer by the appellant to the city, looking toward the formation of a contract for a main extension if necessary, it may have constituted the initial step in the negotiations and so forming a part of a larger contract for water supply and main extension in Baltimore county."

In the evidence offered by the appellee is the testimony of one Levy, assistant distribution engineer of the water supply of Baltimore, in which he says:

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"When an applicant desires water supply he signs one of these applications, and that is just a kind of starting place; that is sent over to the bureau of water supply, and immediately an inspection is made to see whether a main is located in that street or not; when we find a main existing, we send out there to have the service installed. If there is no main existing, we send to the bureau of drafting to draw up plans, and plans are drawn up, and the appellant is notified that it will be necessary to deposit the amount of the probable costs of the installation of that main."

The witness could not say from personal knowledge what was done in this case; that is, whether such procedure was followed.

At the time the application was made in 1923, an applicant was required to pay the costs of the installation of a main before such installation was made, but after the creation of the Baltimore County Metropolitan District by the Act of 1924, Chap. 539, this was not required, as the district advances to the city the costs of laying the mains, and in turn is reimbursed by a special assessment upon the consumer; and in July, 1925, a 6-inch main was actually laid in Susquehanna avenue, through which water was supplied to the applicant's said premises without requiring him first to pay said costs.

It is said in 3 Dillon on Municipal Corporations, § 1317:

"So far as the consumption of water . . . is concerned, it is immaterial to the consumer whether the supply be furnished by the municipality or by a public service corporation. As a general rule, the obligations to the consumer are the same in either case. The organization supplying water, . . . whether it be a municipal or a private corporation, is under a duty to consumers to supply the water . . . impartially to all reasonably within the reach of its pipes and mains. . . . Whether the supply be furnished by a municipality or by a private corporation, the water . . . must be furnished to all who apply therefor, and offer to pay the rates and abide by such reasonable rules and regulations as may be made as a condition of rendering the service. . . . Acceptance by the city or by a public service corporation of an application for a service
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of water, . . . and compliance on the part of the consumer with the reasonable rules and regulations, creates an implied contract under which the city or the corporation by implication agrees to furnish a sufficient supply for the ordinary uses of the consumer."

As to the liability of municipalities in such cases, see, also, *Rittenhouse v. Baltimore*, 25 Md. 336; *Darling v. Baltimore*, 51 Md. 1; 20 A. & E. Ency. of Law, p. 1197, "Municipal Corporations."

[1] In this case the appellant at the time of making his application agreed to pay the water board for making the connection and all charges for the use of the water, as regulated by law, until the said connection was severed in the manner therein stated.

The acceptance of this application, we think, created an implied contract under which the city, by implication, agreed not only to supply him with the water asked for in his application, subject to the reasonable rules and regulations of the appellee, but also to supply the water within a reasonable time thereafter.

[2] It was thought by the appellant that a connection could be made with the inch pipe then in Susquehanna avenue. He, at such time, knew nothing of the construction or holding of the appellee, that a pipe less than two inches was not a main within the meaning of that word as used in his application. After making the application, the appellant remained at his home in Towson until January following, a period of two months, hearing nothing, he says, from the appellee. He then went to Florida and returned in April or May thereafter. Upon his return home he found that the premises No. 25 Susquehanna avenue had not been supplied with water. Early thereafter, the meter man came to his home to "take the meter," and he spoke to him of the failure of the appellee to supply water to his premises. Later he wrote to Mr. Bichey and received the letter which is hereinbefore set out in full. During this whole time the appellant, as stated by him, was never told by the appellee of its ruling that the inch pipe in Susquehanna avenue was not a main with which a connection could be made; and if any

plans were ever made by the bureau of drafting for the installation of a main in said avenue he was not informed of it, and was never asked to deposit the amount of the probable costs of such installation. Until told of the contention of the appellee that the inch pipe in Susquehanna avenue was not a main, and that a new main would have to be installed therein before any supply of water could be made to the premises, there was nothing further for the appellant to do under the rules and regulations of the appellee, as disclosed by the record.

As stated by Dillon, the appellee "is under a duty to consumers to supply the water impartially to all reasonably within the reach of its pipes and mains."

[3] The appellant had obtained water for his home, on the corner of Washington and Susquehanna avenues, through a three-quarter inch pipe laid in Susquehanna avenue, connected with the 2-inch pipe in Washington avenue; and both the printing plant and the railroad depot, which are located east of 25 Susquehanna avenue, were supplied by the 1-inch pipe in said last-named avenue, which was also connected with the 2-inch pipe in Washington avenue. If a connection could not have been made with the 1-inch pipe in Susquehanna avenue, it would seem that a connection could have been made under the regulations of the appellee with the 2-inch pipe in Washington avenue, as was done for the other consumers of water on Susquehanna avenue, some of whose premises were at a greater distance from said point of connection with the pipe in Washington avenue than No. 25 Susquehanna avenue. This means of furnishing water to the appellant's premises does not seem to have been considered by the appellee. If the appellee, upon making investigation, found there was no main in Susquehanna avenue, as defined and understood by it, with which a connection could be made, it was its duty to so notify the appellant, and if an installation of a main in Susquehanna avenue was necessary, the appellee, under its own rules for installing mains, should have made its plans for the installation of a main therein, if the Washington avenue main could not have been utilized, and the appellant furnished a statement of costs for such installation and not kept waiting for the supply of water asked for, P.U.R.1928B.

without being told of the alleged difficulty encountered by the appellee. He should have been given an opportunity to avail himself of the means of acquiring water, even though at a greater cost to him.

There was evidence, we think, sufficient to go to the jury, tending to show loss and damage suffered by the appellant, resulting from the failure of the appellee, under its rules and regulations, to supply water to appellant's premises within a reasonable time after the application was made.

The other 39 exceptions found in the record are to the rulings of the court upon the evidence. The first, second, third, fourth, fifth, sixth, seventh, ninth, tenth, sixteenth, seventeenth, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, thirtieth, thirty-fifth, thirty-sixth, thirty-seventh, and thirty-ninth have been abandoned, leaving the eighth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-eighth, twenty-ninth, thirty-first, thirty-second, thirty-third, thirty-fourth, and thirty-eighth to be considered and passed upon.

[4] The eighth exception was to the action of the court in sustaining the appellee's objection to the question asked the appellant, "After you came back from Florida, what did you do?" This question, we think, was pertinent to the inquiry as to what was done by the appellant to have the water supplied to him under his application.

[5] The twelfth exception was to the rejection of the appellant's answer to a question asked by the court, whether he had received a certain letter, which the appellee claims was mailed to him by one of its officials. We are unable to discover any sufficient reason for the exclusion of his answer. In it he assigned reasons upon which he based his denial, but in them we find nothing to render it inadmissible.

[6] The thirteenth and fourteenth exceptions were to the admission of evidence as to the appellee's designation of the pipes in Susquehanna avenue. This, we think, was material and was properly admitted; and the same may be said of the fifteenth, seventeenth, and thirty-fourth exceptions, where the

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witness was asked as to the procedure of the appellee when application is made to it for water.

We discover no error in the court's rulings in the nineteenth and twentieth exceptions, admitting evidence of the appellee, giving its reasons for not connecting a service pipe with a 1-inch pipe, though, we think, the questions involved in the twenty-first and twenty-second exceptions should have been answered. They were, we think, proper questions upon cross-examination.

[7] The twenty-eighth, twenty-ninth, thirty-second, and thirty-eighth were exceptions to the admission in evidence of certain rules of the water department. These rules, we think, were properly admitted in evidence, and we find no error in the court's rulings thereon. Nor can we say that the court erred in its ruling on the eleventh exception as it is not shown with sufficient clearness to what questions the exception was taken. The question asked by the plaintiff's counsel in the thirty-first exception, whether there were other rules than those mentioned, was, we think, wrongfully excluded.

By the thirty-third exception, a clerk in the bureau of water supply was asked if he treated the application in the ordinary way, and his reply was that he did. We find no error in the admission of this evidence, as it was, we think, material to the issue.

From what we have said, the judgment appealed from must be reversed.

Judgment reversed, and a new trial awarded, with costs to the appellant.

OKLAHOMA SUPREME COURT.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY

v.

STATE et al.

[No. 17318.]

(— Okla. —, 259 Pac. 230.)

Rates — Railroads — Switching rates — Sand — Gravel — Stone.

Where a rate has been fixed by the Corporation Commission for P.U.R.1928B.

services designated by the Commission as a switching service at 2 cents per 100 pounds on sand, gravel, and crushed stone, and said rate is found to be adequate and reasonable, held, that it was not error for the Corporation Commission to order that broken stone should take the same rate as crushed stone, sand, and gravel.

[September 13, 1927.]

Headnote by the COURT.

APPEAL from order of Corporation Commission fixing rates; affirmed.

Appearances: E. T. Miller, of St. Louis, Stuart, Sharp & Cruce and W. T. Stratton, all of Oklahoma City, for plaintiff in error; Shea & Shea, of Tulsa, for defendants in error.

Clark, J.: This is an appeal from Order No. 3240 of the Corporation Commission of the state of Oklahoma.

The Hughes Stone Company filed its complaint before the Commission, in which it was alleged that the Hughes Stone Company is a producer of rock, crushed and broken, at Garnett, Oklahoma; that it is shipping broken rock in pieces weighing about 50 pounds each, in car lots, to Tulsa; that charges are being assessed at the rate of 3 cents per 100 pounds; that as per S. W. L. Tariff 55-G, in Frisco Tariff 1199-A it published the rate of 2 cents from Garnett to Tulsa on crushed stone and crushed rock.

Complainant alleges that the rate on broken stone should be no higher than the rate on crushed stone and gravel; that there is substantially no difference in value, no difference in value of service performed by the defendant, nor is there any difference in value of service to shipper or consignee; that there will be about 130 cars of this stone to be moved, and about 10 cars have been moved; the defendant railroad company insists on collecting charges based on a 3-cent rate.

Complainant prays that the Commission order a reasonable rate published, not to exceed 2 cents per 100 pounds, and a refund made on all cars that have been moved from this work to a basis of 2 cents per 100 pounds.

The Commission found:

“(1) Complainant, the Hughes Stone Company, operates a quarry and crushing plant at Garnett, Oklahoma, and ships crushed stone and rock to the city of Tulsa. Supplement No. 10 P.U.R.1928B.

to St. Louis-San Francisco Railway Company's Freight Tariff No. 1199-S names a rate of 2 cents per 100 pounds for carload shipments of crushed stone from Garnett to Tulsa.

"(2) Complainant alleges that it is shipping broken rock in carloads from Garnett to Tulsa. It asks that the rate between these points, published in St. Louis-San Francisco Railway Company's Tariff 1199-A on sand, gravel, and crushed stone, be applied on shipments of rock in carloads.

"(3) Item No. 316-A, Supplement No. 30 to E. A. Leland's Southwestern Lines Tariff No. 55-G, carries the general schedule of rates applicable on crushed rock and on rock. This item contains the following description of commodities moving between points in Oklahoma under the crushed rock or crushed stone rates: 'Chatts; Gravel; Rock, Common, Crushed or Ground; Rock, Gypsum, Sand; Shale; Stone or Granite, Natural Rough (not dressed or sawed).' From the foregoing description it is seen that no distinction is made in the rates applicable on rock, and crushed or ground rock, on shipments generally between points in Oklahoma.

"(4) The Commission, therefore, finds that the rates on crushed rock or crushed stone, between Garnett and Tulsa, should be made applicable on the shipments herein.

"(5) Complainant asks reparation on shipments which have been moved, to the basis of the crushed stone rate. The Commission finds that reparation on this basis should be granted, and entered its order.

"ORDER.

"Wherefore, premises considered, and the Commission being advised, it is, therefore, *ordered*, that the St. Louis-San Francisco Railway Company shall make applicable on shipments of rock between Garnett and Tulsa the rates now applicable on crushed stone, carried in its Freight Tariff No. 1199-A.

"It is *further ordered*, that the St. Louis-San Francisco Railway Company shall make reparation on shipments herein, which have already moved, to the basis of the rates carried in its Freight Tariff No. 1199-A."

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From this order the St. Louis-San Francisco Railway Company appealed.

Plaintiff assigns several specifications of error, the principal ones being as follows:

"(1) That the findings of fact are not sustained by the evidence.

"(2) Said order is unreasonable, unjust, and contrary to law.

"(3) The rate prescribed in said order will deprive this appellant of its property without consideration and without due process of law.

"(4) That the Commission did not have jurisdiction to require plaintiff to refund charges collected on rates heretofore in effect.

"(5) That said order fixes a rate which is unduly low and discriminatory and requires appellant to afford services to one locality and to a specific shipper at a lower rate than is prescribed for similar service to other localities."

The rate in question covers the broken stone from the quarries at Garnett, near Tulsa, to Tulsa, and this rate was before this court in the case of *Atchison, T. & S. F. R. Co. v. State*, 82 Okla. 288, 200 Pac. 232, and in that case the Commission prescribed the rate load lots from Garnett, Oklahoma, to Tulsa, Oklahoma, and other points within 10 miles of Tulsa to Tulsa. The rates to cover material transported for street paving and road building purposes. This court modified this finding to provide that the rate should cover the transportation of this material for all purposes, and pointed out that the service rendered by the carrier was a switching service and that the rate yields an adequate return for the service rendered.

The record in this case at bar shows the service performed to be a switching service and that the haul was less than 10 miles. In the case at bar the Commission has ruled that broken stone or rock take the same rates as gravel or crushed stone, and under the former holding of this court the only question for determination is, Is there anything in the nature of the commodity by reason of which broken stone should take a higher rate than crushed stone? We think not. The record discloses that there is no difference in value. The broken stone is cheaper

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than crushed stone; there is no difference in service by the carrier.

Plaintiff's Exhibit 1 shows that both crushed rock and rough quarried rock in this territory are rated class E, taking the same rates; that in Oklahoma, under the Southwestern Lines Tariff 55-G, crushed rock, stone, or granite, natural, rough (not dressed or sawed), take the same rate; that from points in Texas to points in Oklahoma, from points in Oklahoma to points in Texas, between points in the state of Texas, between points in Louisiana and points in Texas, between points in the state of Missouri, and between points in the state of Kansas, crushed rock and rock, stone, or building stone take the same rate.

The Commission found rates on crushed rock or crushed stone between Garnett and Tulsa should apply to broken stone.

The finding of the Commission being entitled to the presumption of correctness and there being nothing in the record to overcome this, the order of the Commission should be affirmed.

Appellants' contention that the Commission did not have jurisdiction to order refund of charges collected on rates theretofore in effect was before this court in *St. Louis-S. F. R. Co. v. Standard Paving Co.* 98 Okla. 71, P.U.R.1924E, 861, 224 Pac. 296, in which this court affirmed an order of the Commission awarding reparation. Also, see *Atchison, T. & S. F. R. Co. v. State*, 85 Okla. 223, P.U.R.1922D, 450, 206 Pac. 236.

We think this order of the Commission was correct in holding that broken stone should take the same rate as crushed stone and gravel, and the same is affirmed.

Mason, V. C. J., and Phelps, Lester, Hunt, and Riley, JJ., concur.

WISCONSIN CIRCUIT COURT FOR DANE COUNTY.

VILLAGE OF EAGLE RIVER

v.

RAILROAD COMMISSION OF WISCONSIN.

Evidence — Materiality of evidence as to duty to serve — Village electric plant.

1. Evidence of whether or not a village electric utility ever rep.
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dered local service in another town is immaterial in the determination of whether the utility is by law obligated and empowered to render local service, p. 562.

Evidence — Materiality of evidence of duty to serve — Village electric utility.

2. Testimony as to whether or not a village utility ever rendered service to another town should only be considered as parol evidence tending to show the intent of the village in accepting a franchise from the town, p. 562.

Service — Duty to serve — Village electric utility.

3. A public utility cannot accept only such parts of a franchise as convey rights without assuming the obligations imposed by other parts of the same instrument, such as the duty to serve, p. 563.

[November 25, 1927.]

EVIDENCE at trial in circuit court for Dane County upon action to set aside Railroad Commission being different from and in addition to that offered at hearing before Commission, and a return by the court of such evidence and records to Commission for further consideration; additional evidence considered and previous order of Commission re-affirmed.

To the Honorable, the Circuit Court for Dane County: The above entitled action, being an action commenced in said circuit court for Dane county to set aside an order of the Railroad Commission of Wisconsin, having been brought to trial in said court and the evidence introduced upon such trial being different from and in addition to evidence offered upon the hearing before the Commission, and the court having returned the evidence taken before it and all of the records to said Commission for further proceedings pursuant to law, the Commission, after a review of all the evidence, reports and finds as follows:

[1] The evidence introduced at the trial appears to be largely on the question of whether or not the village of Eagle River ever rendered local service in the town of Cloverland. While this evidence is interesting and enlightening, it appears to be mainly inconsequential in so far as the main issues of this case are concerned. One of the issues to be determined is whether the Eagle River Light & Water Commission is by law obligated and empowered to render local service in the town of Cloverland.

[2] The fact that the village of Eagle River desires to avoid P.U.R.1928B.

local taxation in that town is of no significance whatever. The testimony on the question of whether the village of Eagle River ever did render local service therein seems to be, at best, a matter of secondary consideration, and should only be considered as parol evidence tending to show the intent of the village of Eagle River in accepting the franchise from the town of Cloverland.

[3] The franchise granted by the town of Cloverland to the village of Eagle River, and quoted in our decision dated June 12, 1925, P.U.R.1925E, 671, 673, clearly gives the village of Eagle River an exclusive permit to operate in that town and includes the indeterminate permit defined by the statutes and with it the obligation to serve the public in that town. As stated in our decision, cited above: "The public utility cannot accept only such parts of the franchise as convey rights without assuming the obligations imposed by other parts of the same instrument. . . . It is neither equitable nor was it within the contemplation of the parties to the franchise that the grantee might segregate its parts and exercise rights under only a portion of it. By such exercise the utility must be deemed to have accepted the entire franchise with its burdens as well as its benefits."

The Commission, therefore, reaffirms the findings made in its decision dated June 12, 1925, *supra*, and the order wherein the village of Eagle River was directed to extend electric service to such applicants for service in the town of Cloverland, Vilas county, Wisconsin, as comply with the rules and regulations provided for the furnishing of rural service in the order in this matter entered May 29, 1925, P.U.R.1925E, 208.

CALIFORNIA RAILROAD COMMISSION.

SPERRY FLOUR COMPANY

v.

ISLAND TRANSPORTATION COMPANY.

[Decision No. 18994, Case No. 2335.]

Rates — Out-of-line points — Vessels.

1. A wharf or landing place which appears to be out-of-line in the P.U.R.1928B.

normal navigation course between two major points, can not be given the status of an intermediate point as contemplated by a law (§ 24 (a) Public Utilities Act) providing for special rates to such points, in the absence of specific proof of its right to such status, p. 565.

Rates — Comparison — Reasonableness.

2. A comparison of rates has little, if any, value when no evidence is submitted to show that the rates used in a measure are themselves just and reasonable, p. 566.

Discrimination — Elements of unlawful discrimination — Vessels.

3. Discrimination to be unlawful must be unjust, and to be unjust it must be shown that a carrier's rates at the preferred points are not justified and that the circumstances and conditions are the same as at the point which is alleged to be damaged, p. 568.

Discrimination — Rates — Evidence of discrimination.

4. The mere showing that rates from one point in a territory are higher than rates from other points in that territory, whether maintained by the same or different carriers, does not establish the fact of undue prejudice or preference, p. 568.

[November 3, 1927.]

COMPLAINT alleging rates by vessels on flour or related articles between two points within a state to be unjust and unreasonable and alleging rates on similar articles between other points to be unduly discriminatory, and asking reparation; complaint dismissed on all points.

Appearances: E. D. Smith for complainant; Gwyn H. Baker, for defendant.

By the **Commission**: Complainant is a corporation organized under the laws of the state of California, with its office in San Francisco and a mill at South Vallejo, California, and is engaged in buying, selling, and manufacturing grain and grain products. It is alleged by complaint seasonably filed (a) that the rate of \$2 per ton, minimum weight 12 tons, assessed by defendant for the transportation of flour and articles taking the same rate, moving during the period extending from June 1, 1926, to March 10, 1927, inclusive, from South Vallejo to Stockton was at the time the shipments moved and for the future will be unjust, unreasonable and in violation of § 13 of the Public Utilities Act to the extent it exceeded or may exceed \$1.40 per ton, minimum weight 30 tons; and (b) that the concurrently effective rates maintained by defendant on flour and P.U.R.1928B.

related articles between San Francisco and Stockton and between Oakland and Stockton, of \$1.40 per ton and \$1.60 per ton, respectively, minimum weight 40 tons, are and for the future will be unduly discriminatory to South Vallejo, in violation of § 19 of the act.

Reparation and just, reasonable, nonprejudicial, and nonpreferential rates for the future are sought. Rates will be stated in dollars and cents per ton of 2000 pounds.

A public hearing was held before examiner Geary at San Francisco, and the case having been duly submitted and briefs filed, is now ready for our opinion and order.

[1] South Vallejo is situated at the confluence of Napa Creek and San Pablo Bay. It is served by defendant and the Southern Pacific Company, and the distance by water to Stockton is approximately 76 miles and by rail 108 miles. Complainant's Vallejo mill is located on tidewater and is equipped with docks, spur tracks, and other facilities to enable it efficiently and quickly to receive and ship its products by either rail or water. The major portion of complainant's coarse grain is secured in the Pacific northwest and adjacent territory and moves either by rail direct, or by rail to Portland, thence by water to Vallejo, where it is manufactured into flour and other cereal products. In distributing the manufactured articles to the Stockton district, complainant can use the services of both defendant and the Southern Pacific Company.

The present rate of defendant from South Vallejo to Stockton is \$2 per ton and that of the Southern Pacific \$2.10 per ton. The \$2 rate was assessed and collected on the shipments here involved which moved during the period extending from December, 1926, to March, 1927, inclusive. Prior to December, 1926, defendant erroneously applied a rate of \$1.40, the concurrent rate on flour and mill stuff from San Francisco to Stockton, which rate was not in effect at the intermediate points. For a time defendant through an oversight published this violative rate of \$1.40 without express authority of this Commission under the provisions of § 24 (a) of the Public Utilities Act, a situation which has since been cured by an appropriate order. Complainant admits that on and after May 30, 1926, when the P.U.R.1928B.

tariff was corrected, the rate of \$2 was applicable, and the record indicates that whatever undercharges existed on the shipments moving subsequent thereto have been paid to defendant. Complainant maintains that on the shipments moving before May 30, 1926, the published rate of \$2 from South Vallejo to Stockton was inapplicable, contending for the \$1.40 rate upon the grounds that South Vallejo is directly intermediate between San Francisco and Stockton. The record, however, does not sustain the contention that South Vallejo is an intermediate point on this water route. The only evidence submitted in this connection was some photographs taken from a point in the main channel in Carquinez Straits showing that the docks of complainant were visible to the naked eye. The actual distance from the Carquinez Straits fairway to the docks at South Vallejo is not in evidence, nor does the record show that the vessels traveling by any of the regular routes, California Navigation & Improvement Company, California Transportation Company, or Southern Pacific Company, traversing the waterways between Stockton and San Francisco, pass near or touch at South Vallejo. From the evidence submitted it appears South Vallejo is an out-of-line landing wharf on the route between San Francisco and Stockton, and in the absence of specific proof to the contrary can not be given the status of an intermediate point as contemplated by § 24 (a) of the Public Utilities Act.

[2] Complaint in support of its plea that the South Vallejo-Stockton rate was and is unreasonable *per se* compares the assailed rate of \$2 with the rates concurrently maintained by defendant on flour of \$1.40 minimum weight 40 tons between San Francisco and Stockton; \$1.60 minimum 40 tons and \$2 minimum 12 tons between Oakland and Stockton, and a rate of \$1.35 minimum 20 tons on grain and mill feed between Stockton and South Vallejo. Complainant points to the fact that the haul from San Francisco to Stockton is farther than from South Vallejo to Stockton and also contends that the tidal conditions, loading facilities, handling and other operating factors are favorable for the handling of grain at South Vallejo. While the evidence indicates the operating conditions from South Vallejo

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to Stockton are on the whole more satisfactory than between Oakland-San Francisco and Stockton, complainant has failed to show on this record that the rates used as a measure are in and of themselves reasonable.

Complainant also compares the assailed rate with the rate of \$1.70, minimum weight 10 tons, on sugar between Oakland-Crockett on the one hand and Stockton on the other. This rate is applicable only via the California Transportation Company and is nonintermediate by authority of this Commission, Decision No. 3438, June 19, 1916, in Case No. 214-C, 10 Cal. R. C. R. 377, and Decision No. 7983, August 17, 1920, in Application No. 5728, 18 Cal. R. C. R. 646. No evidence was submitted to show that this terminal rate on sugar was *per se* a just and reasonable rate. We have repeatedly held that mere comparisons of rates such as these have little if any probative value.

Defendant contends the rates between terminal points are unremunerative, and directs attention to the fact that there is now pending before this Commission a petition, Case No. 2319, Bay & River Boat Owners' Association versus practically all river boat operators, for authority to increase the flour rates between San Francisco-Oakland and Stockton from \$1.40 to \$2 per ton. Defendant claims that flour is a difficult commodity to handle, being very susceptible to damage, that in most cases it must be transported in closed barges with the decks and sides lined with paper, and that extra care is required in trucking by reason of the fact that the bags are easily broken. In addition it is maintained that in handling flour from South Vallejo to Stockton it is not possible except in remote instances to utilize the barges traveling between San Francisco and Stockton, but it is necessary to send special equipment from Stockton. Witnesses for defendant testified that the average barge time in the transportation of a load of flour from Vallejo to Stockton was approximately forty-eight hours. This time is segregated into 12 four-hour periods, as follows: first, the movement from Stockton to Vallejo; second, the loading at the barge; third, the movement from Vallejo to Stockton; and fourth, the unloading at destination. If a barge is available near complainant's mill, P.U.R.1928B.

the time is reduced by approximately twelve hours. There was further testimony to the effect that the minimum labor cost for the operation of a barge in the round trip is \$140, and to this sum should be added the cost of fuel, insurance and overhead. The average transportation revenue received is \$200 per trip, which under the proposed rate would be reduced to approximately \$140 per trip. Defendant contends that the rate of \$1.40 between San Francisco and Stockton is extremely low, and that it was necessary to maintain this rate inasmuch as the California Transportation Company published a rate of the same volume, but the record shows that defendant did not handle any flour for this complainant from San Francisco to Stockton by its barges.

A copy of defendant's financial statement for the year 1926, submitted in evidence, shows that the transportation revenue received was \$94,515.62, and the operating expenses including taxes and depreciation were \$150,978.24, resulting in a deficit from operations of \$56,462.62. The sum of \$27,725.85 was charged to depreciation of property and equipment. A deduction of this amount from the operating expenses leaves an out-of-pocket loss of \$28,736.77 for the year. Prior years also show operations at substantial losses.

After careful consideration of all the facts of record we are of the opinion and find that complainant has failed to show that the assailed rate is either unjust or unreasonable.

There now remains for consideration complainant's allegation that the rate of \$1.40 per ton from San Francisco to Stockton is unduly discriminatory to complainant.

[3, 4] In selling flour and other milled products at Stockton complainant is more or less in competition with the flour mills at San Francisco and Oakland, and also with mills in the Pacific Northwest which forward their products to San Francisco by steamer and reship from that port to Stockton. Complainant forwards consignments of flour by rail and water from its mill at Spokane, Washington, to San Francisco, and practically all of its movement of flour from San Francisco to Stockton is moved by the California Transportation Company. Defendant, while maintaining the same rate as the California Trans-
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portation Company from San Francisco to Stockton, did not during the year 1926 handle any of the tonnage between these two cities. If any discrimination exists by reason of the lower rate between San Francisco and Stockton, it is not caused by defendant but by a carrier not a party to this proceeding. Discrimination to be unlawful must be unjust, and to be unjust it must be shown that the rates at the preferred points are not justified and that the circumstances and conditions are the same as at the point which is alleged to be damaged. This record shows that the circumstances and conditions surrounding the rates between San Francisco and Oakland are different from those which govern the South Vallejo to Stockton rate. As previously stated, the first mentioned rates were established by this defendant to meet the competition of the California Transportation Company, and that this carrier does not operate between South Vallejo and Stockton. Carrier competition has long been recognized as a controlling factor in creating different circumstances and conditions, warranting a lower level of rates between points where the competition exists than between points not so situated. The mere showing that rates from one point in a territory are higher than rates from other points in that territory whether maintained by the same carrier or different carriers, does not establish the fact of undue prejudice or preference. (*Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 16 Sup. Ct. Rep. 666; *Interstate Commerce Commission v. Alabama Midland R. Co.* 168 U. S. 144, 42 L. ed. 414; 18 Sup. Ct. Rep. 45; *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, 44 L. ed. 309, 20 Sup. Ct. Rep. 209; *East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission*, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516; *Interstate Commerce Commission v. Louisville & N. R. Co.* 190 U. S. 273, 47 L. ed. 1047, 23 Sup. Ct. Rep. 687.)

We are of the opinion and find from all the facts of record that the rate assailed was not in the past nor its it now unduly discriminatory. The complaint should be dismissed.
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CALIFORNIA RAILROAD COMMISSION.

RE LOS ANGELES COUNTY WATER WORKS et al.

[Decision No. 19005, Application No. 13914.]

Security issues — Factors affecting issuance — Capitalization.

The capitalization of properties should bear some relation to their earnings as well as the cost or the value thereof and a form of capitalization which, on its face, seems to preclude the raising of some of the construction funds through the issue of common stock is not in the public interest and should not be authorized.

[November 4, 1927.]

APPLICATION of county water works to sell its property and to discontinue service, and for another water utility to purchase the said property and resume service and to issue stock in payment for said property; application granted.

Appearances: McAdoo, Neblett and O'Connor, by William H. Neblett, for applicants.

By the **Commission**: In this proceeding the Railroad Commission is asked to enter its order authorizing the Los Angeles County Water Works to exercise the rights and privileges granted it by Ordinance No. 906, N. S., of the board of supervisors of Los Angeles county; to sell and transfer its properties to the Gardena Valley Water Company, a new corporation, and to discontinue public utility service. The Commission is further asked to authorize the Gardena Valley Water Company to purchase and operate the properties of Los Angeles County Water Works, to execute a mortgage and/or deed of trust to secure the payment of an authorized bond issue of \$500,000 and to issue \$125,000 of first mortgage 6½ per cent 20-year bonds, \$30,000 of 7 per cent cumulative preferred stock and \$85,000 of common stock for the purpose of acquiring the properties and paying debts of Los Angeles County Water Works and paying for additions and improvements to said properties.

The Los Angeles County Water Works owns and operates a public utility water system serving the unincorporated towns of Gardena and Moneta and adjacent territory in Los Angeles county and also a portion of the city of Los Angeles in the so P.U.R.1928B.

called "shoestring strip." The service area is bounded on the north by Ballona avenue, on the south by Electric street (182d street), on the west by Arlington street and on the east by Figueroa street. At the end of 1926 there were, according to the record, 1799 services attached to the water system of Los Angeles County Water Works. For the reason that not all of the services are metered, it has been impossible for the company to furnish a record of its water sales. Both the increase in services and the operating revenues indicate an increase in the company's business. The number of services in 1922 are reported at 1242 and the operating revenues at \$22,819; while for 1926 the number of services, as said, are reported at 1799 and the operating revenues at \$37,675.

The estimated historical cost of the properties and the estimated reproduction cost thereof are reported in applicant's Exhibit "F" as follows:

Estimated original cost:	
Plant as of December 31, 1926	\$246,539.00
Proposed improvements	39,100.00
Organization expenses	2,500.00
Total	\$288,139.00
Estimated reproduction cost:	
Plant as of December 31, 1926	\$304,792.00
Proposed improvements	39,100.00
Organization expense	2,500.00
Total	\$346,392.00
Less accrued depreciation	60,335.00
Estimated reproduction cost less accrued depreciation	\$286,057.00

If the depreciation annuity is calculated on a 5 per cent sinking-fund basis, the amount in the depreciation reserve (applicable to original cost) is reported at \$42,512 and if calculated on 6 per cent basis, \$39,452. The company in its Exhibit No. 2 shows a depreciation reserve of \$29,340.91.

In Decision No. 17208 dated August 11, 1926 (Vol. 28, Opinions and Orders of the Railroad Commission, page 451) it appears that the engineering department of the Commission estimated the original cost of the properties of the company as of December 31, 1925, at \$227,443. Adding the net cost of the additions and betterments installed during 1926 to the \$227,-P.U.R.1923B.

443 makes a total of \$243,933 as compared with the company's estimate of \$246,539.

The analysis of the evidence shows that the net income, that is, the amount available for interest, amortization of debt discount and expense, interest on the depreciation reserve, dividends and surplus is estimated at \$14,500.

Exhibit No. 2 shows that the Los Angeles County Water Works on August 31st had outstanding \$64,500 of common stock, \$40,000 of 6 per cent bonds, and had current liabilities of \$80,635.08, such current liabilities consisting of \$47,821.13 of notes payable and \$32,813.95 of accounts payable. Its current assets are reported at \$11,932.47, which, deducted from current liabilities, leaves net current liabilities of \$68,702.61.

To acquire the properties of Los Angeles County Water Works, pay its debts and provide \$30,000 for additions and betterments, the Gardena Valley Water Company asks permission to issue and sell at 94 and accrued interest \$125,000 of 6½ per cent 20-year bonds, \$30,000 of 7 per cent preferred stock at par, and \$85,000 of common stock, presumably at par. Had the proposed capitalization been outstanding during the current year, the company would earn less than 2 per cent on the \$85,000 of common stock.

While there is no question but that the properties of Los Angeles County Water Works should be refinanced they should, in our opinion, be refinanced on a basis different from that proposed in this proceeding. Too much emphasis is being placed on the number of times the net earnings of a property may exceed bond interest or dividends on preferred stock. It is just as important, if not more so, to capitalize a property so that it can show reasonable earnings on common stock. The records of this Commission show conclusively that companies which have been able to obtain some of their construction funds from the sale of common stock have been able to sell readily bonds or preferred stock and furnish more satisfactory service.

It should also be remembered that we are not concerned here with a property to be constructed, but with a property which has been in operation for years and that the rates of the Los Angeles County Water Works have only recently been deter-

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mined by the Commission. It is our conclusion that the capitalization of the properties in question should bear some relation to their earnings as well as the cost or the value thereof, and that a form of capitalization which on its face seems to preclude the raising of some of the construction funds through the issue of common stock is not in the public interest and, therefore, should not be authorized by this Commission. We, therefore, believe that this application, in so far as it involves the transfer of properties, the cessation of public utility service, the issue of stocks and bonds, and the execution of a mortgage, should be denied without prejudice.

Los Angeles County Water Works asks permission to exercise the rights and privileges granted to it by Ordinance No. 906 (new series) of the county of Los Angeles. This ordinance permits the company to maintain a system of water pipes under and across certain public highways in said county. A map showing the territory covered by the ordinance has been filed in this proceeding as Exhibit "D." It is alleged that the company at the time it obtained the franchise (August 20, 1923), was not aware that a certificate declaring public convenience and necessity require the exercise of the rights and privileges granted by said franchise would be required. No one appeared to protest the granting of the certificate. It should be understood, however, that the certificate is effective as of the date of the supplemental order referred to in the following order. It should also be understood by Los Angeles County Water Works that it must give satisfactory service throughout the territory covered by the franchise, if it expects this Commission to prevent other utilities from operating in the territory.

COLORADO PUBLIC UTILITIES COMMISSION.

RE PUBLIC SERVICE COMPANY OF COLORADO.

[Application No. 954.]

RE CITY OF FORT MORGAN.

[Application No. 958.]

[Decision No. 1497.]

Monopoly and competition — Commission approval of antiduplication contract — Electric utilities.

1. The Commission approved in the interest of public convenience and necessity a contract between a private and a city electric utility whose proposed lines closely paralleled each other for several miles, whereby the territory common to the two plants was divided in equitable fashion and the routes of the lines accordingly readjusted, p. 575.

Monopoly and competition — Limitations of anticompetitive contract — Electric utility.

2. A stipulated division of rural territory by two utilities, parties to an anticompetitive agreement, whereby a privately owned utility agreed to give a city plant first chance to serve the customers, was excluded from certificates of convenience and necessity of both where the city did not appear to desire or consent to such service in the near future and where the Commission believed it unwise to pre-empt such territory in favor of a utility which might never be willing to serve it, p. 577.

[November 19, 1927.]

APPLICATION of privately owned and municipally owned electric utilities for certificates of public convenience and necessity authorizing the extension of lines, power systems, and facilities into specifically divided territory; both applications granted.

Appearances: Paul W. Lee, Attorney, for Public Service Company of Colorado; Stoton R. Stephenson, Attorney, for the city of Fort Morgan, Colorado.

By the Commission: On August 15, 1927, the Public Service Company of Colorado filed its application praying for authority to extend, construct, maintain, and operate a transmission line from the western boundary of the town of Brush, Colorado, to the unincorporated town of Weldona, Colorado, together with all substations and other facilities necessary there. P.U.R.1928B.

to. Thereafter written protest was filed by the city of Fort Morgan.

On August 24, 1927, the city of Fort Morgan filed its application praying for authority to extend, construct, maintain, and operate a light and power transmission line into territory north and northeast of the city of Fort Morgan and to the country club situated slightly west and about a mile and one half north thereof.

[1] The two cases were set for hearing in the hearing room of the Commission on September 19, 1927. While they were not consolidated for hearing they were heard largely in the same manner as if they had been consolidated. While the main immediate purpose of building the transmission line from Fort Morgan to Weldona is to serve the town of Weldona, the application of the Public Service Company of Colorado alleges, and the evidence shows, that it expects to render service along the route of the line. As said line would closely parallel for several miles the line sought to be built by the city of Fort Morgan, and as the two applicants could not at the time of the hearing come to any agreement as to how the territory should best be divided, the Commission proposed at the conclusion of the two hearings that the parties go over and consider carefully the territory common to the two applications and endeavor to reach a conclusion satisfactory to themselves and for the best interests of the public. Thereafter representatives of the parties, in company with the engineer of this Commission, made a trip over the territory and finally reached an agreement which is set forth in correspondence now on file with the Commission consisting of a letter dated November 1, 1927, written by H. H. Kerr, superintendent of the electric department of Public Service Company of Colorado, addressed to Messrs. Leo, Shaw and McCreery; a letter dated November 1, 1927, written by Paul W. Lee, Esquire, to Stoton R. Stephenson, Esquire; a letter dated November 2, 1927, written by Stoton R. Stephenson, Esquire, to this Commission and a letter dated November 10, 1927, written by Paul W. Lee, Esquire, to this Commission. The letter last referred to was accompanied by a map showing the route to be taken by Public Service Company of Colorado as finally P.U.R.1928B.

agreed upon, said map being marked "Exhibit 'A'-44-0, 240-1."

The Commission is of the opinion and so finds that the extensions and locations to be made by the two applicants as agreed upon by them meet and serve the public convenience and necessity.

The route of Public Service Company of Colorado as agreed upon and approved by this Commission is as follows:

Beginning at approximately the Southwest corner of the Southeast quarter of the northeast quarter of section 3, T. 3 N., R. 56 W. of the 6th P. M. on the line of the western boundary of the town of Brush, thence following the main highway to the west through centers of sections 3, 4, 5 and 6, T. 4 N., R. 56 W.; thence north along the section line road to a point near Dodd station situated between the South Platte river and the Union Pacific Railroad in section 25, T. 4 N., R. 57 W.; thence in a southwesterly direction along a private right-of-way lying between said river and said railroad, crossing said railroad at a convenient point in section 26 to meet the main highway near the center of section 26 and thence along said highway which extends to the west through the centers of sections 26, 27, 28, 29, and 30 of T. 4 N., R. 57 W., thence west into section 25, immediately west of said section 30, to a point near the Fort Morgan Country Club; thence south approximately one-half mile; thence west approximately along the southern boundary of sections 25 and 26, T. 4 N., R. 58 W.; thence south approximately a mile and a half to the new state highway; thence west and south along the new state highway to the section line road extending north from the new state highway between Range 58 and Range 59, both west of the 6th P. M.; thence north along said section line road to the southeast corner of section 1, T. 4 N., R. 59 W.; thence west one-half mile; thence north one-half mile to the center of said section 1; thence west one-half mile; thence north one-half mile to the northwest corner of said section 1, and thence west approximately a mile and a half to Weldona.

The Commission further finds in accord with the agreement of the parties that the public convenience and necessity requires P.U.R.1928B.

that the Public Service Company of Colorado should be permitted to attach to this extension such business as may develop along this line and in the territory contiguous thereto, including the unincorporated community of Weldona and the Ft. Morgan Country Club except that along the east and west highway extending through the centers of sections 27, 28, 29, and 30, T. 4 N., R. 57 W. it may serve only those customers on the south side of said line whose improvements are fronting on said half section line.

The Commission finds also in accord with the said agreement of the parties, that the public convenience and necessity requires that the application of the city of Ft. Morgan for permission to construct a proposed extension of its distribution system to the north from Main street of said city through the center of section 31 and the south half of section 30, T. 4 N., R. 57 W. to the point of meeting with the said line authorized to be constructed by Public Service Company of Colorado should be granted, and the city of Ft. Morgan should be allowed to attach such business as may develop along this line and in the territory contiguous thereto, except those customers along the half section line through the centers of sections 27, 28, 29, and 30 T. 4 N., R. 57 W. whose improvements are fronting on the said half section line. The Commission finds that the proposed extension of the city of Ft. Morgan's distribution system to the west into section 1, T. 3 N., R. 58 W., also its extensions to the east to serve customers in sections 3, 4, 5, 8, 9, and 10, T. 3 N., R. 57 W. and also to the south through the center of section 7, T. 3 N., R. 57 W. are required by the public convenience and necessity, and that these extensions should be completed and the city of Ft. Morgan allowed to serve this area and consumers contiguous thereto in so far as practicable.

[2] In the agreement of the parties and also in the testimony taken at the hearing, evidence was introduced in regard to the rural territory south of the Burlington railroad and southwest of the city of Ft. Morgan which is further described as sections 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20, 21, 22, 23, and 24, T. 3 N., R. 58 W. and territory immediately contiguous to these sections which was referred to as a profitable rural territory de-P.U.R.1928B.

siring electric service. While Public Service Company of Colorado "agreed to give the city of Ft. Morgan the first refusal, that is, the first chance to serve the customers" in this area, it appears that the said city of Ft. Morgan does not now desire or consent to render the service at any time in the near future. While the agreement with respect to this territory is entitled to and will receive such consideration as it deserves, the Commission is of the opinion and so finds that it would be unwise and contrary to the public convenience and necessity to preempt this territory in favor of a utility which may never be willing to serve it. There appears not to be any desire on the part of the Public Service Company of Colorado to serve the said territory at this time. Therefore, for the same reason, as well as on account of the said agreement, no certificate authorizing such service should be issued to said company.

The Commission finds that the capital to be invested by Public Service Company of Colorado in constructing said extension to be made by it is \$33,000, and that the capital to be invested by the city of Ft. Morgan in constructing the extension to be made by it is \$3,000. However, neither of these amounts shall be binding on the Commission in any valuation case conducted for the purpose of determining reasonable rates.

IDAHO PUBLIC UTILITIES COMMISSION.

RE BOISE WATER COMPANY.

[Case F-655, Order No. 1112.]

Service — Special cost of water service to high section — Agreement for higher rates.

An agreement between residents of an elevated section outside of city limits, but within the metropolitan area, and a water utility by which the residents consented to higher rates for service than those collected from city patrons, in consideration of the additional equipment made necessary to maintain pressure at such altitude and the expense of service extension, was approved by the Commission as just and reasonable to the parties thereto as well as other consumers within the city limits.

[January 5, 1928.]

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PETITION of water utility for Commission approval of an agreement by the company with residents of certain section beyond the limits of the city for increased rates; approved.

Appearances: Joseph J. Turner, General Manager, Boise, Idaho, representing Boise Water Company; J. M. Lampert, of the firm of Oppenheim & Lampert, Boise, Idaho, representing present and prospective patrons in the territory on the bench.

By the **Commission**: On the 17th day of December, 1927, a petition was filed by J. M. Lampert, representing the present and prospective patrons of the Boise Water Company, on the bench south and west of Boise City, Idaho, requesting this Commission to give its approval to the general plan, rates, terms, and other conditions set forth in an instrument named "agreement," attached to said petition, and those terms of the said "agreement" over which this Commission has jurisdiction are hereby referred to and by reference made a part hereof.

After due notice given, hearing was held before this Commission at its office in the State Capitol, Boise, Idaho, at 10 o'clock A. M., January 3, 1928. At said hearing the parties were represented as above set forth. Oral and documentary evidence was submitted by the Boise Water Company, and the statements made by J. M. Lampert, representing the patrons. At the conclusion of the submission of the evidence by the water company and the statements by the attorney for the present and prospective patrons, the matter was taken under advisement.

The territory affected by the proposed "agreement" is designated, the first bench, which lies across the Boise river from Boise City and is outside the limits of said city. The elevation of said territory is approximately thirty feet above the highest point served by the Boise Water Company in Boise City, and is approximately four miles distant from the company's reservoir in Hull's Gulch. On account of the elevation of the territory on the said bench and its distance from the company's reservoir in Hull's Gulch an additional reservoir will have to be constructed on the second bench, which bench is adjacent to and above the first bench, and a pipe line system in connection with said reservoir extending to and through said territory, in P.U.R.1928B.

order to give efficient service to the present and prospective consumers within same.

The evidence shows that the construction of the proposed reservoir and pipe line system therefrom, in order to give adequate service to the company's present and prospective patrons on the bench, will in nowise benefit the company's present or prospective consumers within Boise City, Idaho. That on account of the additional expense of constructing said reservoir and the mains therefrom a number of the present and prospective patrons have signed said proposed "agreement," which provides for a different minimum than the minimum within the limits of Boise City, Idaho. Said proposed minimum is \$1.50 net monthly, or \$4.50 net quarterly, for 5,000 gallons of water per month, and for all water used in excess of this minimum the same rate as governs in Boise City shall apply.

The said proposed "agreement" also provides that the company shall charge \$50 per tap for connections with its main line, including carrying connections to the property line, for each new tap and service in said territory from the present time until said territory is brought within the boundaries of Boise City, or forms a separate municipality, or a change in these terms is made by the Public Utilities Commission of the state of Idaho.

It appears from the statements and evidence presented that the present consumers on the bench are desirous of having the present service made more efficient. But there is a large number of residents within said territory on the bench who are at present not supplied with water and are desirous of obtaining water for domestic purposes from the Boise Water Company, and said parties realizing that in order to obtain efficient service the company will be put to large expense in constructing the said proposed reservoir and pipe line system leading therefrom, have presented to this Commission the proposed "agreement" attached to said petition.

Upon a consideration of the extent of the elevation of this territory on the bench above the elevation of the territory within Boise City, Idaho, served by said company, the distance which said territory lies from the company's reservoir in Hull's Gulch, making it necessary to construct an additional reservoir on the P.U.R.1928B.

second bench and a pipe line system therefrom in order to maintain sufficient pressure to afford efficient and adequate service, the reasonableness of the terms of the proposed "agreement" and the statements made in support thereof by the representative of the present and prospective patrons of the company, and all other facts, conditions, and circumstances presented, the Commission is of the opinion that it should approve the terms as to rates, rules, and regulations of the proposed "agreement" attached to the petition, as aforesaid, without prejudice, however, to the Commission in any future hearing or hearings involving rates, rules, regulations, or service.

In matters of this kind the Commission has not made and cannot make any set rule for its guidance, but each and every case must be determined upon the particular facts, conditions, and circumstances presented in connection therewith.

Upon a consideration of the representation and evidence presented in this matter, the Commission finds:

1. That those terms as to rates, rules, and regulations of the said "agreement" attached to the petition, which "agreement" is hereby referred to and by reference made a part of this finding, under all the facts, conditions, and circumstances presented, are just and reasonable, and the same as to rates, rules, and regulations should be approved by this Commission without prejudice, however, to the Commission in any future hearing or hearings involving rates, rules, regulations, or service.

2. That the rates provided in said proposed "agreement" should become affective ten days after the company has given notice of its completion of the construction of the works as provided in said "agreement" by a written notice mailed to each consumer or prospective consumer, and the provisions in the "agreement" relating to charges for taps should become effective from date hereof.

It is therefore *ordered*, that the Boise Water Company is hereby required to file within ten days from date hereof with this Commission an acceptance of the terms of the proposed "agreement," and file therewith a schedule of rates, rules, and regulations in accordance with the terms hereof.

It is *further ordered*, that the present rates, rules, and regulations be continued until the new rates, rules, and regulations are filed.

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ulations of the Boise Water Company with reference to the territory on the bench be, and the same are hereby, cancelled at the time or times the rates, rules, and regulations shall go into effect as provided in Findings 1 and 2 of this order, and in lieu thereof, the rates, rules, and regulations found just and reasonable in said findings are hereby fixed and established as the rates, rules, and regulations for the said territory, as provided in said findings, which said findings are hereby referred to and by reference made a part of this order.

ILLINOIS COMMERCE COMMISSION.

JOHN R. DUNLAP

v.

CLARENDON HILLS WATER COMPANY.

[No. 17669.]

Service — Utility's duty to serve over municipal mains outside of corporate limits.

1. Water service from a main constructed by a village for use of a private utility operating wholly within the same was ordered on complaint of a consumer residing on that side of a boundary street which was just outside of the corporate limits but directly opposite such main, notwithstanding refusal of service by the village and by the utility, in view of the fact that the latter had undertaken the responsibility of service throughout the territory within a reasonable radius of access as provided by law (§ 38 of an Act Concerning Public Utilities, June 21, 1921) and further that it had a monopoly of service in that vicinity subject to the jurisdiction of the Commission, p. 585.

Service — Effect of collateral contracts on duty to serve — Water utility.

2. A utility's choice of means wherewith to render service and agreements or contracts it may have made pursuant thereto such as service over municipally owned and constructed mains cannot be given the effect of lessening in any way its primary duty and liability to provide facilities and service generally and without discrimination throughout its territory, p. 587.

Public utilities — Commission jurisdiction over private operator of municipally owned mains.

3. The Commission has jurisdiction to regulate service by a private utility over municipal mains notwithstanding a law (§ 10, Commerce Commission Act) exempting from its jurisdiction municipally

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owned plants, on the ground that the term "public utility" as used in the act applies to the operating organization rather than the physical property itself, p. 588.

Service — Territorial restriction within metropolitan area — Water utility.

4. Service to an applicant therefor who resides on that side of a boundary street which is just outside of the corporate limits of a village in which a utility has previously confined its operation, should not be denied where neither the certificate of convenience nor the articles of incorporation restrict the utility from extending service to all within a reasonable radius of access to its mains within § 38 of the Commerce Commission Act, p. 589.

[January 11, 1928.]

COMPLAINT of an applicant for water service for failure by a water utility to supply the same; service ordered.

By the **Commission**: On September 16, 1927, a complaint in the above matter was filed by Mr. John R. Dunlap. An answer was filed by the Clarendon Hills Water Company on October 24, 1927. The cause came on for hearing at the offices of the Commission in Chicago on November 22, 1927. At the said hearing Mr. John R. Dunlap appeared in his own behalf, the Clarendon Hills Water Company was represented by Mr. V. L. Linderholm, its attorney, and an entry of appearance was made on behalf of the village of Clarendon Hills by Mr. O. P. Goode, village attorney.

Evidence in support of the complaint was given by the testimony of the complainant in his own behalf. The respondent entered in evidence the testimony of Mr. E. T. Chalberg, secretary of the Clarendon Hills Water Company, and also introduced in evidence certified copies of a contract between the Clarendon Hills Water Company and the village of Clarendon Hills, covering the use of certain water mains here in controversy, also a certified copy of the ordinances under which the respondent operates in the village of Clarendon Hills. The taking of evidence closed on November 22, 1927, and the cause was marked heard and taken.

There appears to be no controversy as to the essential facts involved in this case. The complaint refers to the failure and refusal of the respondent company to supply water service to the P.U.R.1928B.

complainant at his residence which is located just outside of the territorial limits of the village of Clarendon Hills in Downers Grove township, DuPage county.

The Clarendon Hills Water Company is an Illinois corporation and has charter powers to engage in the business of rendering water service in the territory comprising the said subdivision known as Clarendon Hills and in the territory adjacent thereto. A certificate of convenience and necessity was granted to the said Clarendon Hills Water Company on March 19, 1924, in Docket Case No. 13810, whereby the said company was authorized to construct a system of water works and render water service in what was then the unincorporated subdivision known as Clarendon Hills. Subsequently, Clarendon Hills was incorporated as a village and a franchise was granted by the village authorities to the Clarendon Hills Water Company.

The territory comprising the village of Clarendon Hills is divided into two parts by the tracks of the Chicago, Burlington & Quincy Railroad. The Clarendon Hills Water Company constructed and placed in operation between eight and ten miles of water mains in the portion of the village lying to the north of the said railroad and also constructed a well and pumping facilities. A contract or agreement was entered into between the Clarendon Hills Water Company and the village of Clarendon Hills, a copy of which is in evidence herein as "Respondent's Exhibit A." The said contract reads as follows:

This agreement, made this 15th day of August, A. D. 1925, between the Clarendon Hills Water Company, a corporation, party of the first part, and the village of Clarendon Hills, a municipal corporation, party of the second part:

Witnesseth, that, whereas, on the third day of September, A. D. 1924, the president and board of trustees of the village of Clarendon Hills, in the county of DuPage, and state of Illinois, duly passed and approved an ordinance, granting to the said Clarendon Hills Water Company, a franchise to maintain and operate a water works and to supply water to the public, within the limits of the said village of Clarendon Hills, for a period of thirty years, a certified copy of which franchise is hereto attached and made a part hereof, and

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Whereas, the said party of the first part has continuously since the granting of the aforesaid franchise been maintaining and operating said water works and supplying a portion of said village under and by authority of the terms of said franchise, and

Whereas, the said village of Clarendon Hills, is desirous of making certain local improvements, to consist of water mains, laterals, extensions, and fire hydrants to supply water to parts of said village not now so supplied and is desirous of providing a certain adequate supply of water in connection with the aforesaid mains, laterals, and hydrants, and to levy a special assessment against the property benefited thereby;

Now, therefore, in consideration of the granting of the franchise above mentioned, to the party of the first part by the party of the second part and for other good and valuable considerations, the Clarendon Hills Water Company agrees to furnish water to the public within the limits of the said village of Clarendon Hills through and in connection with the mains, laterals, extensions, and hydrants which the said village may lay and install, for and during the time that the aforesaid franchise is in force and effect, at such rates and under such conditions as may be mutually agreed upon by the parties hereto or that may be fixed by law.

In witness whereof: The Clarendon Hills Water Company has caused this instrument to be executed on its behalf by its president and its corporate seal to be affixed thereto, attested by its secretary, pursuant to a resolution passed by the said Clarendon Hills Water Company, and the village of Clarendon Hills has caused this instrument to be executed on its behalf by its president, and the village seal affixed thereto, attested by the village clerk pursuant to an ordinance duly passed and approved by the president and board of trustees of the village of Clarendon Hills.

[1] Pursuant to the aforesaid agreement, the village authorities constructed about fifteen miles of water mains in the territory of the village south of the aforesaid railroad tracks, and water service to consumers was established by the Clarendon Hills Water Company, using these mains as part of the facilities employed in the said service. The mains thus constructed by the P.U.R.1928B.

village were paid for by special assessment upon the abutting property.

One of the mains thus constructed by the village extends along Fifty-fifth street, Clarendon Hills, the said Fifty-fifth street being an east and west street which runs along the south territorial limits of the village. The residence of Mr. John R. Dunlap, complainant, herein, is on the south side of said Fifty-fifth street, being, therefore, just outside of the village limits, but directly opposite the said main. It is admitted that this main, which is a 6-inch main, is of sufficient capacity to serve the complainant and all other prospective consumers on either side of the said street, although there is some testimony in respect to possible inadequacy of the company's well to provide at all times sufficient water if all persons who desire service be furnished it.

The Clarendon Hills Water Company maintains no local office in the village of Clarendon Hills, but has its only office in the city of Chicago. Applications for water service as a matter of convenience are made to the village authorities and by them transmitted to the water company at its Chicago office. It appears that the complainant made application to the village authorities for water service and after some discussion, the village authorities concluded that he was not entitled to service because of the fact that the main through which he would expect to be served is one of those built by the village and that complainant's premises are outside of the village limits. It appears that the complainant also made verbal application directly to the Clarendon Hills Water Company for service and that the said company declined to render service, principally because of the position taken by the village authorities in the matter. The complaint to the Commission followed.

The questions before the Commission, therefore, relate to—first, its jurisdiction over the Clarendon Hills Water Company in respect to service and facilities, and—second, the propriety of requiring the Clarendon Hills Water Company to render service outside of the territorial limits of the village, its service now being confined entirely to service within the village.

It is clear that the Clarendon Hills Water Company is engaged in rendering general water service throughout the entire P.U.R.1928B.

territory covered by the system of water mains above referred to, including both the mains laid by the said respondent at its own expense and those which it uses in its business under terms of its agreement with the municipality. The Clarendon Hills Water Company supplies water directly to all of its consumers and the consumers make payments for water service directly to the said company. The payments are made under a rate schedule which is uniform for all portions of the territory served, without regard to whether the mains to which the various consumers are connected are those built at the expense of the water company or are those paid for by assessment against property owners.

The evidence indicates that it is the present practice for the village authorities to do such maintenance work as is required upon the mains in the south part of the village and that when service connections are made to those mains, they are made under direction of the village authorities. The matter of maintenance and service connection does not appear to be specifically covered by the written contract between the water company and the municipality. It is not necessary for the purposes of this case that the precise extent of the rights and duties of the water company and the municipality in respect to maintenance and the making of service connections be determined. It is sufficient that it is established that the Clarendon Hills Water Company has undertaken the responsibility of rendering water service as a public utility throughout this territory, that in the said territory it has a monopoly of that service and is, as to its service and facilities, subject to the jurisdiction of this Commission.

Every public utility is charged with certain duties, among them the duty of rendering service and providing the facilities necessary thereto. Section 38 of "An Act Concerning Public Utilities," approved June 21, 1921, in effect July 1, 1921, reads in part as follows:

"Every public utility shall, upon reasonable notice, furnish to all persons who may apply therefor and be reasonably entitled thereto, suitable facilities and service without discrimination and without delay."

[2] It is, therefore, the duty of the respondent company to
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provide adequate facilities and render service to all persons within this territory who may be reasonably entitled thereto. The said respondent is not relieved in any way of its duty under the aforesaid section by reason of the fact that it does not have a full and complete title to certain of the water mains. The respondent was and is properly empowered, both by local and state authorities, to construct its own water mains and facilities in all of the territory served by it, including the entire territory of the village of Clarendon Hills. It has elected to supply certain of its consumers by means of the mains covered by its aforesaid agreement with the municipality. The respondent's choice of means wherewith to render the service, and any agreements or contracts which it may have made pursuant thereto, cannot be given the effect of lessening or diminishing in any way its primary duty and liability under the statute to provide facilities and furnish service generally and without discrimination throughout its territory.

[3] It is suggested that the Commission is without jurisdiction as to the mains operated by the Clarendon Hills Water Company but owned either by the municipality or the abutting property owners. Section 10 of the Commerce Commission Act, above referred to, reads in part as follows:

"The term 'public utility,' when used in this act, means and includes every corporation, company, association, joint stock company or association, firm, partnership, or individual, their lessees, trustees, or receivers appointed by any court whatsoever (except, however, such public utilities as are or may hereafter be owned or operated by any transportation district or other municipality, and except such telephone company or companies which are or may hereafter be purely mutual concerns, having no rates or charges for services, but paying the operating expenses by assessment upon the members of such company or companies and no other person or persons) that now or hereafter:

(a) May own, control, operate, or manage, within the state, directly or indirectly, for public use, any plant, equipment, or property used or to be used for or in connection with the transportation of persons or property or the transmission of telegraph

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or telephone messages between points within this state; or for the production, storage, transmission, sale, delivery or furnishing of heat, cold, light, power, electricity, or water; or for the conveyance of oil or gas by pipe line; or for the storage or warehousing of grain; or for the conduct of the business of a warfonger or that

(b) May own or control any franchise, license, permit, or right to engage in any such business."

The exception stated in parenthesis in the first paragraph above quoted excludes from the Commission's jurisdiction, among other things, such "public utilities" as may be owned by a municipality but the term "public utilities" by the very terms of the same paragraph is defined, not as physical property or public utility plant, but as the corporation, company, etc., that may own and operate the property. The supreme court of this state in various decisions has indicated that the jurisdiction of this Commission is confined to the control and supervision of the owners and operators of property devoted to public use and has indicated that the term "public utility" as used in § 10 of the said act refers to the organization which owns or operates property for public service, rather than to the physical property itself. State ex rel. Evansville Teleph. Co. v. Okaw Valley Mut. Teleph. Asso. 282 Ill. 336, P.U.R.1918C, 583, 118 N. E. 760; State P. U. C. ex rel. Macon County Teleph. Co. v. Bethany Mut. Teleph. Asso. 270 Ill. 183, P.U.R.1916A, 997, 110 N. E. 334, Ann. Cas. 1917B, 495; State Pub. Utilities Commission v. Bartonville Bus Line, 290 Ill. 574, P.U.R.1920B, 310, 125 N. E. 373.

Applying to the term "public utilities" the meaning thus stated in the statute and declared by the courts, it would not appear to be the intent of the section above quoted to limit the jurisdiction of the Commission as to any public utility company by reason of the fact that such company may operate under contract or lease, physical property that is owned by a municipality.

[4] Reference has been made to the fact that the premises of the complainant are located outside of the territorial limits of the village. This gives rise to the question as to whether the territory in which the respondent has undertaken the responsibility. P.U.R.1928B.

bility of rendering water service is necessarily limited by the boundaries of the village. The record does not support such a proposition. The Clarendon Hills Water Company was organized and obtained a certificate of convenience and necessity prior to the incorporation of the village and neither in its Articles of Incorporation nor in the certificate applied for and granted by this Commission was there any provision restricting its service to the territory which might later be included within the corporate limits of the village. The fact is that the respondent operates a water system, part of which extends along Fifty-fifth street directly in front of the complainant's house and, except for the fact that the village line intervenes between the complainant's house and the main, there would be no question as to the complainant being entitled to service. The Commission is of the opinion that the complainant is reasonably entitled to service within the meaning of § 38 of the Commerce Commission Act.

The Commission having considered the record herein and being fully advised finds that the Clarendon Hills Water Company, respondent herein, is a public utility engaged, with proper authority so to do, in rendering water public utility service in territory along the route of a certain system of water mains in DuPage county, and that the said Clarendon Hills Water Company, as to all its service, and facilities, is subject to the provisions of "An Act Concerning Public Utilities," approved June 29, 1921, in effect July 1, 1921, and subject to the general and complete jurisdiction of this Commission.

The Commission further finds that the premises of the complainant, Mr. John R. Dunlap, are located and abut upon a public street in which a water main, one of the facilities employed by the Clarendon Hills Water Company in the rendition of its service, is located; that the said water main is of sufficient capacity and in every way adequate and suitable to serve the premises of the said complainant, that the said complainant has made application to the said Clarendon Hills Water Company for water service, that the said Clarendon Hills Water Company declined to furnish such service, and that the said complainant is reasonably entitled to be furnished with water service within the meaning of § 38 of the act above referred to in the preceding P.U.R.1928B.

paragraph, notwithstanding the fact that his premises are not within the territorial limits of the village of Clarendon Hills.

The Commission further finds that the Clarendon Hills Water Company should be ordered and directed to make connection to the premises of John R. Dunlap, complainant herein, and to establish service thereto as hereafter set forth, and that jurisdiction of the cause should be retained by the Commission for the purpose of taking such further action as may be necessary or advisable in the matter.

MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES.

RE SELECTMEN OF THE TOWN OF AMESBURY et al.

[D. P. U. 2822.]

Rates — Reduction because of improvident service contract — Power from affiliated company.

Rates of an electric utility were reduced 1 cent per kilowatt hour where the company had been supplied current by a power and building company having the same officials as the utility under a contract allowing the private company a profit apparently at the utility's expense.

(WELLS and GOLDBERG, Commissioners, dissent.)

[January 20, 1928.]

PETITION of the selectmen of a town for reduced electric rates; reduction ordered.

By the **Commission**: This company supplies electricity to the inhabitants of the towns of Amesbury and Salisbury, including Salisbury Beach. For a number of years it purchased its electricity from the Newburyport Gas & Electric Company (now the Haverhill Electric Company), hereinafter called the "Newburyport Company," through an agreement with the Merrimac Valley Power & Buildings Company, a private corporation, hereinafter called the "Buildings Company," the officers and directors of which are the same as those of the Amesbury Electric Light Company, hereinafter called the "Amesbury Company." One of the contentions of the petitioners was that, due to the relations that exist between the Amesbury Company and P.U.R.1928B.

the Buildings Company, the latter company had unduly profited at the expense of the customers of the Amesbury Company. The Buildings Company owns several buildings in Amesbury, which are separated by a public way or ways. These buildings are rented to tenants that are engaged largely, if not wholly, in manufacturing requiring light and power. It also owns a water-power development with a steam auxiliary, from which it generates electricity. Under an agreement between these companies, entered into in 1916 for a period of years, all the electricity generated by the Buildings Company and that purchased from the Newburyport Company was delivered on a common bus at the power house of the Buildings Company in Amesbury; that purchased from the Newburyport Company was delivered at approximately 13,000 volts and was transformed to a lower voltage by the Buildings Company. It was then delivered over the lines of the Amesbury Company either in whole or in part to supply the respective customers of each company. The cost of all the electricity purchased from the Newburyport Company and the cost of transforming the same, together with the operating expenses of running the plant of the Buildings Company, including certain transmission line rentals was divided between the two companies in proportion to their use plus one-half mill per kilowatt hour profit to the Buildings Company on all electricity delivered to the Amesbury Company. The fixed charges on the plant used, including interest, depreciation, taxes, and insurance, were apportioned between the two companies on the basis of their respective demands, which in the case of the Amesbury Company varied from 2000 to 2200 kilowatts, and in the case of the Buildings Company was 525 kilowatts. The Company presented an exhibit, No. 17, showing the cost of the electricity delivered to each company under the joint agreement or contract above referred to, which was 2.09 cents per kilowatt hour to the Amesbury Company and 2.2 cents per kilowatt hour to the Buildings Company. It appeared from the annual return of the Amesbury Company to this Commission for the year 1926 that the cost of electricity to it was 2.22 cents per kilowatt hour, instead of 2.09 cents as shown on the exhibit. This difference was explained by the officers of the company as being due to a direct payment made P.U.R.1928B.

by the Amesbury Company to the Newburyport Company of \$4,277.53, which was not included in Exhibit 17, and a further payment of \$4,181.67, an adjustment between the companies for electricity delivered in the years 1922, 1923, and 1925. On the basis of the payment of \$4,277.53, the amount paid for the electricity purchased from the Newburyport Company was 1.57 cents per kilowatt hour, instead of 1.5 cents per kilowatt hour, as shown on the exhibit, and the cost to each company at the bus bar in Amesbury was 2.15 cents per kilowatt hour to the Amesbury Company and 2.25 cents per kilowatt hour to the Buildings Company, or a difference between the price paid to the Newburyport Company and the cost to the Amesbury Company at the bus bar of approximately .58 cents per kilowatt hour.

In Exhibit No. 17, above referred to, showing the combined cost of all the electricity, was an item under fixed charges, "interest at 6 per cent \$26,308.68." This is the interest on \$438,478, or substantially the figure agreed upon in a contract between the Amesbury and the Buildings Companies dated March 23, 1926, as the value of the property and equipment used in procuring, generating, and delivering electricity. It will be noted that this interest charge alone almost equals the amount paid by the Buildings Company for the electricity it received, namely, \$26,731.36 as apportioned under Exhibit 17. There was also included under fixed charges

Depreciation	\$6,771.44
Taxes	7,284.24
Insurance	638.34

making a total of fixed charges of \$41,002.70, equivalent to approximately 2.2 cents per kilowatt hour on all the electricity generated by the Buildings Company in 1926 for fixed charges, to say nothing of any rental paid on the transmission line or operating costs.

In the year 1926 there was purchased from Newburyport Company 6,777,740 kilowatt hours and the Buildings Company generated 1,856,450 kilowatt hours. According to the record of the monthly output of the Buildings Company's plant, there were three months in the year when both the hydro and steam plant contributed only 1 per cent of all the electricity that went into

the pool and there were five months in the year when the hydroelectric plant was unable to supply the requirements of the Buildings Company alone, yet the Amesbury Company was paying 80 per cent of the fixed charges of this hydroelectric plant. While the year 1926 may have been below the average year as regards rainfall and while the Amesbury Company contended that the auxiliary steam plant of the Buildings Company was a valuable asset in case of an emergency, we are of the opinion that the arrangement between these companies was of greater value to the Buildings Company than to the utility.

With a view to justifying this arrangement, the company submitted an estimate made by an engineer of what the probable cost of the electricity to the Amesbury Company would have been in 1926 had it purchased it direct from the Newburyport Company. This estimate tended to show that would have cost the Amesbury Company more than it did.

Another estimate of the cost to the Amesbury Company if the electricity had been purchased under the terms of the joint agreement using prices provided for in a contract recently made between the Merrimac Company and the Portsmouth Power Company was submitted. This estimate showed the cost on such a basis would have been somewhat lower.

There was also another estimate of the cost to the Amesbury Company made on the assumption that it had purchased its power direct from the Portsmouth Company on the basis of its new contract. This estimate showed that the cost to the Amesbury Company for the electricity used in the year 1926 would have been slightly higher than the actual cost.

Counsel for the company further argued that the Amesbury Company has now entered into a contract with the Portsmouth Power Company for all the electricity it will need in excess of what the Buildings Company will be able to furnish it from its water power development; that the electricity received from the Portsmouth Company will be delivered to the Amesbury Company direct; that the water power plant of the Buildings Company will be used to reduce the demand on the Portsmouth Company as much as possible; that this will cause an important saving; and that whatever the relations between these companies

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have been in the past, they will be no longer in force or effect and have nothing to do with determining the just and reasonable rate to be charged for electricity to be furnished and delivered. There is no evidence, however, that the dealings between this utility and the private company, having the same officials, are to cease. The outstanding objectionable feature is that the personal and financial relationship between the two companies will remain substantially the same. The great majority of the customers of a public utility are willing to pay a fair and reasonable price for what a commodity or service honestly and rightfully costs, but they do not want the officers and directors of that utility entering into contracts or agreements whereby a private company may profit financially at the public's expense; nor do they want to be required to go to the trouble and expense of a rate case to ascertain whether such private company is so profiting. Such a situation only tends to keep alive that feeling of suspicion and distrust which is not for the best interests of the company or its consumers.

In the year 1926, the Amesbury Company earned and paid 9 per cent on its outstanding stock, equivalent to substantially $8\frac{1}{2}$ per cent on its stock and premiums. If the company paid \$4,181 in the year 1926 for electricity used in years gone by, as it claims to have done, this payment should not recur. The company estimates there should be some savings under its new contract with the Portsmouth Company.

The price now charged for electricity by the Amesbury Company is 14 cents per kilowatt hour, a reduction of one-half cent having been made in April and one-half cent in October of 1927. We believe that a further reduction of 1 cent a kilowatt hour should be made. This will actually mean a 2 cents' reduction from the net maximum rate in force at or about the time of the filing of the petition. In view of all the facts in this case we are of the opinion that the company should reduce its maximum rate to 13 cents per kilowatt hour, and it is therefore

Ordered, that the net maximum price to be hereafter charged for electricity by the Amesbury Electric Company be and hereby is fixed at 13 cents a kilowatt hour, such price to apply to all P.C.R.1928B.

bills rendered on account of meter readings after February 1, 1928.

Wells and Goldberg, Commissioners, dissenting: We are in accord with the views of the majority except as to the maximum rate. We dissent from their view that the maximum rate should be fixed at 13 cents per kilowatt hour. If the Amesbury Company should extricate itself from its entanglement with the Buildings Company, as it should, we believe that its operating expenses would be so reduced that the fair maximum rate would be no more than $12\frac{1}{2}$ cents per kilowatt hour. Accordingly, we are of the opinion that the net maximum rate should now be reduced $1\frac{1}{2}$ cents per kilowatt hour and that the net maximum rate to be charged for electricity by the Amesbury Electric Company should be fixed at $12\frac{1}{2}$ cents per kilowatt hour.

MASSACHUSETTS DEPARTMENT OF PUBLIC UTILITIES.

RE BOSTON, REVERE BEACH & LYNN RAILROAD COMPANY.

[D. P. U. 3066.]

Security issues — Duty of Commission to consider sale price — Future issues.

1. Stock cannot be authorized to be issued in the future to retire bonds where the Department cannot determine whether the amount of shares applied for would be necessary or whether the future market price would not be so low as to be inconsistent with public interest in view of a statute compelling the decision of the Department as to such issues to be based on the consistency of the sale price with public interest, p. 597.

Security issues — Economics resulting from electrification of steam road — Bonds.

2. An issuance of bonds to provide for the electrification of an interurban railroad previously steam operated was approved as consistent with public interest where the savings in operating expenses and labor alone were shown to be more than sufficient to cover interest charges on the additional capital necessary for the electrification and where the Department was satisfied that the change would not increase or postpone a reduction of fares but instead would result in improved service and maintenance economies, p. 598.

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Security issues — Sale discount absorbed by construction economy.

3. Bonds to be issued at \$93 on \$100 to provide for the electrification of a steam railroad were approved where the difference between the sale price and the face value was amortized and could be absorbed by the savings effected by the change of operation, p. 599.

Service — Economies of electrification of steam railroads.

Discussion of the ways in which electrification of steam lines reduces operating expenses and improves service, p. 598.

(HARDY and GOLDBERG, Commissioners, dissent.)

• [January 20, 1928.]

PETITION of railroad company for approval of issuance of stocks and bonds; approved in accordance with order.

By the **Commission**: This is a petition of the Boston, Revere Beach & Lynn Railroad Company for the approval of the issuance of 1,700 shares of additional capital stock, the issuance of bonds to the amount of \$1,000,000 face value, bearing interest at the rate of 6 per cent, and the issuance of 10,200 shares of additional capital stock. The purpose of the issue of the 1,700 shares of additional capital stock and of the \$1,000,000 face value of bonds is to provide means for retiring the floating indebtedness of the company and for the electrification of its railroad system. The purpose of the 10,200 shares of additional capital stock is for retiring said bonds at some time in the future when, it is believed, the shares of stock can be successfully sold on terms which will result in a saving in interest charges on the bonds.

[1] We think that we ought not to authorize an issue of shares of stock to be issued in the future to retire such bonds. The decision of the Department as to the amount of stock reasonably necessary for the purpose for which the stock is proposed to be issued under our statutes must be based upon the price at which such stock is to be issued and the Department is to refuse to approve any particular issue of stock if in its opinion the price at which it is proposed to be issued is so low as to be inconsistent with the public interest. Consequently, we cannot at this time determine whether the 10,200 shares of stock applied for would be necessary for the purpose of retiring said bonds or P.U.R.1928B.

whether the price in the future at which they would be sold, if they were now authorized, would not be so low as to be inconsistent with the public interest.

The proposed issue of 1,700 shares is in substitution of 1,700 shares authorized by our predecessors, the Public Service Commission, but never issued. The proceeds of these shares are to be used solely for the retiring of indebtedness incurred for capitalizable purposes.

[2] As the company has already \$1,000,000 bonds outstanding, which is in excess of its outstanding stock of \$850,000, it is necessary for us to be satisfied that the issuance of bonds is consistent with the public interest before they may be issued, notwithstanding that we approve of the issue of the 1,700 shares of additional capital stock. Consequently, we have felt that we should be satisfied that the proposed electrification of the road will have no tendency to increase or postpone reduction of the fares that must be paid by the public for transportation on the system and will not impair the service thereon. The engineering division of this Department has made a careful study of the proposals of the company and, as a result of its study and calculations, we are of the opinion that the proposed electrification will have no tendency to increase or postpone a reduction of the fares charged on the railroad or increase the operating expenses of the company and will tend to improve its service. The company, at the present time, does not obtain the highest efficiency in its steam operations. The price it pays for coal is relatively high, due to its lack of storage capacity and the handling of the coal is done in an expensive manner. The company proposes to adopt the multiple-unit system of electric operation, which will reduce the labor cost in the operation of each train and will effect a saving in power. The main reduction in labor cost over that of steam, resulting from electrification, is brought about through the elimination of the fireman, the operator of the train taking the place of the engineer on the engine. The saving in compensation to firemen alone will amount to \$61,547.09.

We are convinced, also, that the company will save in the cost of power by the use of electricity in place of steam. As the P.U.R.192SB.

railroad is now operated the engine that brings a train into the company's terminal is detached from the train and the train is taken out by another engine. This results in the engine and crew that brings in the train laying over until another train comes in, to which the engine is attached to operate the train out. This results in long layovers, particularly in the middle of the day and runs up materially the cost of fuel and labor. Where the multiple-unit system is applied, a train coming into the terminal is operated by the same crew out, as the operator simply changes his place of operation from one end of the train to the other. It is fair to assume that the saving on account of power will amount to approximately \$50,000, and there will be other savings in labor of approximately \$76,000. These savings alone will more than cover the interest charges on the additional capital necessary for the electrification. Moreover, there will be better efficiency in operation of the trains, as the trains can be stopped at the stations more readily and can pick up speed and leave the stations more rapidly, which will result in a quicker and better service. There are also other savings which apparently can be effected, due to savings in the maintenance of the equipment. Thus, apparently there will be a saving in the cost of operation and an improvement in the service. This being so, we are of the opinion that the issuance of the bonds to provide means for the changes proposed is consistent with the public interest.

[3] We have some reluctance in approving bonds to be issued at \$93 on \$100, but it appears that this is the best price that the railroad has been able to obtain. It may be that the fact that the bonds will be second mortgage bonds and that the results of the electrification are yet to be demonstrated is the reason why a better price cannot be obtained. As the difference between the price at which the bonds may be sold and their face value must be amortized, and, in our judgment, can readily be absorbed by the savings to be effected, a majority of us have, with some reluctance, come to the conclusion that the fact that the bonds cannot be sold at better than \$93 on \$100 ought not to stand in the way of the improvement.

Accordingly, it appearing, after notice and hearing and further P.U.R.1928B.

ther investigation, that the proposed issue of 1,700 shares of additional capital stock, and \$1,000,000 par value of 6 per cent bonds, are for lawful purposes and are consistent with the public interest,—it is *ordered*, that the approval of the Commission be hereby given to the issue by the Boston, Revere Beach & Lynn Railroad Company at the price of \$100 per share, as fixed by its stockholders, of additional shares of capital stock not exceeding one thousand seven hundred in number, amounting at par value to \$170,000, the proceeds of said issue to be applied exclusively to the payment of \$170,000 of the principal amount of \$250,000 of floating indebtedness properly incurred for lawful purposes as shown in the schedule on file with the petition.

Any excess in the proceeds of these shares over the amount to be applied as above stated shall be held for such application to cost of permanent additions and improvements in the property of the petitioner as the Commission shall hereafter approve.

And it appearing that no additional shares of stock of the Boston, Revere Beach & Lynn Railroad Company were issued under the order of the Public Service Commission dated December 31, 1913, said order dated December 31, 1913, 1 Ann. Rep. Mass. P. S. C. 175, is hereby revoked and cancelled.

And it is *further ordered*, that the approval of the Commission be hereby given to the issue by the Boston, Revere Beach & Lynn Railroad Company of \$1,000,000 par value of 6 per cent bonds payable January 15, 1933, and secured by a general mortgage of the property of said railroad company at the price of not less than \$93 for each \$100 par value of said bonds, the proceeds of said issue of bonds to be applied:

(1) To the payment of the balance of \$80,000 of floating indebtedness properly incurred for lawful purposes as shown in the schedule on file with the petition; and

(2) To the payment of proper capital expenditures for the electrification of the railroad and for making other permanent improvements, the estimates for the costs of such electrification and such permanent improvements being shown in the schedule on file with the petition.

Any excess of the proceeds of these bonds over the amount to
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be applied as above stated shall be held for such application to cost of permanent additions and improvements in the property of the petitioner as the Commission shall hereafter approve.

Provided, however, that none of the above bonds shall be issued by the railroad until it has received at least \$150,000 for at least 1,500 shares of the 1,700 shares first above authorized to be issued.

And provided further that for the amortization of the discount on the said bonds, the company is hereby required to set aside in equal semiannual amounts a sum sufficient to amortize the amount of the discount at the maturity of the bonds.

Hardy and Goldberg, Commissioners, dissenting: We concur in the views expressed by the majority as to the saving in the cost of operation and the improvements in service which would be effected by the electrification of the railroad. From all the evidence and under all the circumstances, however, we are not convinced that we ought to authorize the issuance of the bonds at a price as low as \$93 on a par of \$100, and we, therefore, do not concur therein.

MONTANA PUBLIC SERVICE COMMISSION.

RE HELENA ELECTRIC RAILWAY COMPANY.

[Docket No. 993, Report & Order No. 1497.]

Commissions — Jurisdiction to relieve from obligation of service — Abandonment of traction system as a whole.

1. The question of whether a Commission has been given power by the legislature to grant a public utility the right to cease operations altogether will not be decided in a proceeding where the utility has voluntarily invoked the jurisdiction of the Commission by filing a petition for abandonment, p. 603.

Service — Complete abandonment of traction system — Obligations of franchise.

2. The fact that the terms of an original franchise may continue to govern the use of streets by a railway company and its successor so long as they exercise the privileges contained therein does not give rise P.U.R.1928B.

to any obligation on the part of the street railway company to operate a system at a loss where there is nothing in the franchise but a permissive charter, p. 606.

Service — Abandonment — Dedication to public use upon the expiration of franchise — Street railways.

3. The fact that a utility devotes its property to public use by operating a street railway system which it has purchased after the expiration of the franchise therefor does not constitute an irrevocable or absolute dedication of its property to the use of the public, p. 606.

Service — Abandonment — Failure to earn return — Franchise expiration — Dedication to public use — Street railways.

4. The devotion by a street railway company of its property to a public use by the operation of a system after the expiration of the franchise therefor is predicated upon the assumption and condition that the public shall supply sufficient traffic to yield a fair return, and upon a clear showing that future operations must be at a loss it has the unquestionable right to discontinue operations and salvage what it can by dismantling the system, p. 606.

Constitutional law — Due process — Denial of authority to abandon service — Inadequate return — Street railways.

5. To compel a street railway company to operate a system at a loss, or to give up its salvage value, would be to take its property without the just compensation which is a part of due process of law, p. 607.

Service — Abandonment of street railway system — Opportunity for establishment of substitute service.

6. The Commission in granting the petition of a street railway company to cease its operations as a whole, ordered the service to be continued until a future date, in order to guard against any hiatus in the transportation service of a city and its contiguous territory, p. 607.

Commissions — Effect of decisions of Commissions in other states — Abandonment of street railways.

7. A decision by the Public Service Commission of a sister state compelling a street railway company upon the discontinuance of its entire system to leave the surface of the streets in a condition similar to the remainder of the highway under a statute in that state expressly controlling such abandonment will not apply to the same situation in a jurisdiction having no such statute, p. 608.

Service — Commission powers — Abandonment of traction system — Repair of streets.

8. The right of the Commission to permit the withdrawal of a street railway company property from the use of the public should logically be accompanied by the authority to fix reasonable terms and to compel the withdrawal of all of the property where the leaving of a portion thereof, such as tracks, ties, and roadbed, might constitute a public nuisance to the highway, p. 608.

Service — Abandonment of traction system — Repair of the highway upon abandonment.

9. The Commission ordered a street railway utility in withdrawing its property from the use of the public to leave the streets, avenues, and highways in a good condition of repair, p. 608.

[November 18, 1927.]

En banc. PETITION of the street railway company constituting the transportation service of an entire city for abandonment of service; petition granted to be effective after reasonable opportunity for the establishment of substitute service.

Appearances: Lester Loble, city attorney, for the city of Helena; Raymond T. Nagle, attorney, for the Helena Building & Realty Company; John M. Sullivan, mayor of East Helena, for the city of East Helena; Charles E. Pew, attorney, for the American Smelting & Refining Company; Gunn, Rasch, Hall and Gunn, attorneys, by M. S. Gunn, for petitioner, Helena Electric Railway Company; W. G. Ferguson, secretary for the Helena Commercial Club; Francis Silver, counsel, and Fred E. Buck, chief engineer, for the Commission.

By the Board: On October 11, 1927, the Helena Electric Railway Company, a Delaware corporation, filed with the Commission a petition requesting permission of the Commission to "discontinue and abandon the further maintenance and operation" of its street railway system in the city of Helena and its connecting lines extending to East Helena, Fort Harrison, and the plant of the State Nursery & Seed Company. Failure of the street railway service to earn revenue sufficient to cover operating expenses and the impracticability of increasing its revenue by raising its charges for its service are assigned as the grounds for the relief requested.

[1] For the first time since the establishment of the Public Service Commission of Montana the question of granting our approval to a complete abandonment and discontinuance of a street railway system is presented to the Commission.

It has been suggested to the Commission (but not urged by any of the parties appearing in this proceeding) that the power granted to the Commission by the legislature of giving it "supervision, regulation, and control" of public utilities refers only P.U.R.1928B.

to a going concern and that authority to grant a public utility the right to cease functioning as such does not reside in the Commission. We recognize that some courts of last resort and some Commissions have handed down decisions to that effect (see *Spartanburg v. South Carolina Gas & E. Co.* 130 S. C. 125, P.U.R.1925C, 459, 125 S. E. 295; *Re Columbia R. Gas & E. Co.* (s. c.) P.U.R.1927D, 684), but the utility in this proceeding having voluntarily invoked the jurisdiction of the Commission by filing its petition for abandonment we do not feel called upon to express an opinion upon this point but will determine its right in the premises upon the merits.

On April 4, 1901, by Ordinance No. 491, the city of Helena granted to George Brill, his successors and assigns, the right to erect, operate, and maintain a street railway plant in the city of Helena over certain designated streets and avenues for a period of twenty-five years. The Helena Light & Railway Company, a corporation, succeeded to the rights of Brill and undertook the operation and maintenance of the street railway system contemplated by the ordinance. With the exception of certain branches, regularly abandoned, the Helena Light & Railway Company operated the said street railway system in Helena and its environs until the 15th day of September, 1927, when it was succeeded by the Helena Electric Railway Company, petitioner herein. At the expiration of its franchise on March 31, 1926, no steps were taken by the Helena Light & Railway Company to have its franchise renewed or extended, but it nevertheless continued to operate its street railway system as before, with the exception that from November 2, 1925, to September 15, 1927, the street railway system was operated by A. T. Schultz, as Receiver of the said Helena Light & Railway Company, under an order of the United States District Court for the District of Montana. In the receivership proceedings all the property of the Helena Light & Railway Company (which included besides its street railway system, and electric and gas plant that was serving the residents of Helena and contiguous territory) was sold "under the hammer" to a representative of the bondholders of the insolvent corporation. Thereafter, on July 8, 1927, two corporations were formed under the laws of P.U.R.1928B.

Delaware, to wit: Helena Electric Railway Company and the Helena Gas & Electric Company, the former taking over as of September 15, 1927, the property and business of the street railway system, excepting its car barn, and the latter succeeding as of the same date to the electric and gas plant and to the car barn. Both of the newly-formed corporations, it appears from the records submitted at the hearing, are officered and manned by the same personnel. This severance of the assets of the insolvent corporation was made with the object in view of withdrawing the street railway system from public use.

The evidence submitted in behalf of the allegations of the petition is exceedingly brief. Figures that are not challenged as to accuracy were submitted showing the gross revenue, the operating expenses, taxes paid, and deficits incurred in the operation of the street railway system since January 1, 1921. Summarized, they disclose deficits each year (including taxes) as follows: 1921, \$34,594.64; 1922, \$28,703.23; 1923, \$42,371.56; 1924, \$45,051.66; 1925, \$45,283.36; 1926, \$48,179.45 and during the first ten months of 1927 (not including taxes) \$21,540.80. During the first ten months of the present year the deficits (not including taxes) ranged from \$1196.11 for the month of October to \$3,320.87 for the month of August.

As reflecting one of the principal causes of the failure of the utility to even earn its operating expenses it was developed at the hearing that the total number of passengers carried by the utility in 1919, to wit: 1,500,688, dwindled progressively at the rate of approximately one hundred thousand per year until in 1926 when the utility carried 763,691 passengers. In other words, the street railway's only source of income in a period of eight years has been reduced 50 per cent. The record further bears out the statement that conditions for 1927 show no improvement in respect to the number of passengers carried.

All branches of the system show a loss. It was suggested that perhaps if the East Helena line could be divorced from the rest of the railway system it would be a paying proposition, but data submitted to the Commission on this line indicates a deficit for the year of 1926 of \$12,917.78 or approximately 25 per cent of the loss suffered that year by the entire system. Clearly, un-P.U.R.1928B.

der such a showing, it is idle to consider the suggestion that this branch might be successfully operated at a profit.

The case presented by the record is simply one of a public utility, whose available traffic has diminished to a point where further operation is economically impossible, asking the authority of the state of Montana, acting through its Public Service Commission, to withdraw its property from the public use.

[2] As above pointed out, we are not here concerned with a consideration of any contractual rights existing in favor of the city of Helena (or of East Helena, as the records shows that it only became an incorporated town in August of 1927 and has not granted any franchise or rights to petitioner or its predecessors to operate within its corporate limits) nor are we concerned with any obligations imposed by franchise upon the street railway company. Even though we were to take the strained view urged upon us by counsel for the city of Helena that the terms of the original franchise granted April 1, 1901, continued to govern the use of the streets by the Helena Light & Railway Company and its successor, the petitioner herein, after its expiration March 31, 1926, so long as petitioner exercised the privileges originally granted, we can see nothing in the original franchise but a permissive charter, which would not give rise to any obligation on the part of the street railway company to operate its system at a loss. See *Helena v. Helena Light & R. Co.* 63 Mont. 108, P.U.R.1922E, 588, 207 Pac. 337.

[3, 4] The fact that petitioner devoted its property to a public use by operating the street railway system on and after September 15, 1927, does not constitute, under the facts in this record, an irrevocable or absolute dedication of its property to the use of the public. Rather, is its devotion of its property to a public use predicated upon the assumption and condition that the public shall supply sufficient traffic on a reasonable basis to yield a fair return. And when it develops, as it is here shown to have developed, that future operations must be at a loss, then the company has the unquestioned right to discontinue operations and salvage what it can by dismantling the system. (*Texas R. Commission v. Eastern Texas R. Co.* 264 U. S. 79, 68 L. ed. 569, P.U.R.1924C, 407, 44 Sup. Ct. Rep. 247.) P.U.R.1928B.

[5] To compel petitioner to operate its system at a loss, or to give up the salvage value, would be to take its property without the just compensation which is a part of due process of law. (Brooks-Scanlon Co. v. Railroad Commission, 251 U. S. 396, 64 L. ed. 323, P.U.R.1920C, 579, 40 Sup. Ct. Rep. 183.) The rule has been aptly stated by the supreme court of Montana in *Helena v. Helena Light & R. Co. supra*, thus: "It is now well settled beyond controversy that a public utility cannot be compelled to operate its entire business, or a branch of its business, at a loss, in the absence of a statute or contract requiring it to do so." To the same effect are: *Fort Smith Light & Traction Co. v. Bourland*, 267 U. S. 330, 69 L. ed. 631, P.U.R.1925C, 604, 45 Sup. Ct. Rep. 249; *Bullock v. Florida ex rel. Railroad Commission*, 254 U. S. 513, 65 L. ed. 380, P.U.R.1921B, 507, 41 Sup. Ct. Rep. 193; *Lyon & Hoag v. Railroad Commission*, 183 Cal. 145, P.U.R.1920F, 227, 190 Pac. 795; *Laighton v. Carthage*, 175 Fed. 145.

[6] Believing, as we do, from a consideration of the authorities mentioned that the petitioner has made out a conclusive case, we shall not attempt to analyze the protests on file in this matter. However, it is noteworthy that without exception the protests recognize at least tacitly, the right of the petitioner to withdraw from the field. Their import, generally speaking, is that the city and environs should not be left without transportation facilities and that it is to the public interest if abandonment be permitted, that it be made effective at such a date in the future as will permit a new utility of the motor bus type to become organized and ready for operation. The Commission recognizes the absolute soundness of these representations and to guard against any hiatus in transportation service for the residents of Helena and contiguous territory, it will make its order herein effective as of midnight December 31, 1927, and will issue a certificate of public convenience and necessity for motor bus service to serve the territory covered by the present street railway upon the express condition that operation thereunder will commence January 1, 1928, with a regular and adequate schedule.

The cities of Helena and East Helena strenuously object to P.U.R.1928B.

any order of abandonment or discontinuance by the Commission unless it is made conditional upon the petitioner restoring the streets and avenues into a condition of good repair. On the other hand, the petitioner asserts that inasmuch as the exclusive control over the streets and avenues, within the limits of incorporated cities and towns, is vested by law in the city or town council (Chap. 20, Laws of 1927), this body is without authority or jurisdiction to make any such order. Petitioner couples with its objection the pledge that it will perform its full legal obligation in respect to the streets and avenues of Helena and East Helena and the public highways of Lewis and Clark County where its tracks, etc., traverse or cross same.

[7] "The authorities on the question seem to be scarce. Our research has uncovered but two cases, both decided by the New York Commission (In Re Yonkers R. Co. P.U.R.1925D, 195, and Re Westchester Electric R. Co. (anno.) P.U.R.1925D, 212, decided February 26, 1925). In each of these cases the New York Commission permitted discontinuance of street railway lines upon the condition that the utility would remove or cause to be removed at its own expense, from that portion of the street or highway its track, roadway, and overhead structure occupied, and fill and restore the street so that its conditions, surface, and pavement would be similar to that of the remainder of the street. But New York has an express abandonment statute, which we do not have, so these precedents are of doubtful value.

[8] However, since petitioner's application, in effect, requests permission to withdraw its property from the use of the public, it should not be permitted to withdraw only a portion thereof and leave the remainder, such as the tracks, ties, and road-bed where it might constitute itself a public nuisance. If the right to permit withdrawal is vested in the Commission (and it is conceded in this proceeding), that right should logically be accompanied by the authority to fix reasonable terms."

[9] Being an administrative body we do not assume to determine the legal rights or obligations existing between the street railway company and the cities of Helena and East Helena and the county of Lewis and Clark, but we do believe that, subject to P.U.R.1928B.

such legal rights and obligations as exist, we can and will order the utility in withdrawing its property from the use of the public to leave the streets and avenues and highways in a good condition of repair.

NEW JERSEY BOARD OF PUBLIC UTILITY COMMISSIONERS.

E. H. WOOD

v.

PUBLIC SERVICE ELECTRIC & GAS COMPANY.

Service — Discontinuance — Honest dispute of high gas bill.

1. Discontinuance of service to enforce payment of a gas bill disputed in evident good faith as excessive is not justified until the question of the consumer's indebtedness has been settled in a court of law, p. 610.

Service — Discontinuance — Improper action of patron.

2. A gas utility is justified in discontinuing service where the consumer refuses or neglects to maintain a condition at his residence admitting of regular meter readings, without hazard or threat of same to the reader from such causes as vicious dogs, p. 610.

[January 19, 1928.]

COMPLAINT by consumer of gas utility of excessive bill; jurisdiction of dispute refused, and service ordered continued pending settlement in law court.

Appearances: E. H. Wood for the complainant; H. P. J. Steinmetz for the company.

By the Board: E. H. Wood complained originally on August 6, 1927 of a gas bill rendered by the Public Service Electric & Gas Company, amounting to \$37.11 and covering a two-month period from October 20 to December 17, 1926, as being excessive when compared with former bills rendered. It is not denied by the company that this bill is in excess of any previous bill rendered.

The complainant testified that gas is used for cooking, for heating water and to supplement his house-heating equipment; the gas appliances consisting of a Vulcan gas range having four top burners, a broiler and an oven burner, a gas light in the P.U.R.1928B.

kitchen, a No. 25 Ruud water heater in the cellar and a Clow automatic room heater.

A meter was installed on March 28, 1924 and was removed and tested by the company on January 24, 1927, in connection with a complaint received from Mr. Wood. A test of the meter, made by an employee of the company with a Standard meter prover that had been tested and sealed by the Board's inspectors, proved the meter to be 9.1 per cent slow. The reading taken when the meter was tested agrees with the reading taken when it was removed from service.

The disputed bill covers a period of approximately two months. The previous bill, covering a period of three months, amounted to \$10.80 which might indicate that the meter was under-read, resulting in a low bill for the three-month period and a correspondingly higher bill for the two-month subsequent period. The meter readings indicate a consumption of 43,200 cubic feet during the last six months that the meter was in service. This is an average consumption of 7,200 cubic feet of gas per month and an average monthly bill of \$8.64.

[1] Nothing has been disclosed in this case upon which the Board can base a finding that the complainant has been billed for more gas than was actually consumed. The complainant in evident good faith insists that the bill is excessive and that the company is not justified in collecting the amount of the same. Under these conditions it is the Board's opinion the company would not be justified in discontinuing service to enforce payment of its bill but that the question of the complainant's indebtedness is one for settlement in a court of law.

[2] This case differs from the usual complaints received by the Board, in that the meter, through the fault of the complainant, was not read monthly. If the readings had been made monthly the trouble might have been averted. The testimony shows that the complainant's house was frequently closed when the meter reader called and that regular readings were impossible; also it appears that the complainant is the owner of several police dogs, which he keeps on the premises. On one occasion one of the dogs jumped through a glass door when the company's employee called to read the meter, and the owner of the dogs

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warned the meter reader to beware of them. Because of these circumstances, the usual practices could not be carried out. The company is fairly entitled to have the meter at complainant's premises read monthly by its meter reader. It cannot be reasonably expected to make a special or unusual effort to obtain readings. If the complainant sees fit to keep at his premises dogs whose dispositions are such as it is necessary or advisable for the owner to warn the meter reader to be on his guard against them, it is natural for the reader to avoid entering the premises. If the complainant refuses or neglects to maintain a condition at his residence admitting of regular meter readings, without hazard or threat of same to the reader, the company will be justified in discontinuing service and refusing to resume the supply until such condition is corrected.

OREGON PUBLIC SERVICE COMMISSION.

RE STANDARDS FOR MOTOR CARRIERS.

[F-A-62, P. S. C. Or. Order No. 1537.]

Service — Automobiles — Intermediate points.

A motor carrier has no right to refuse to transport passengers on the highway to and from intermediate points on their route, since passengers along the highways are entitled to carriage on the first available bus to their destination, provided such bus has unoccupied seats.

[November 18, 1927.]

INVESTIGATION of motor carrier service; order issued relating to service at intermediate points.

By the **Commission**: Petitioner avers that the failure of the Commission to prescribe definite and specific standards of service, equipment and/or facilities for motor carriers conducting intrastate operations under the provisions of Chapter 380, General Laws of Oregon for 1925, has made possible unjust discrimination and destructive competition between competing carriers engaged in the transportation of persons and/or property on regular schedules between fixed termini on the Pacific Highway wholly within the state of Oregon. John F. Logan and P.U.R.1928B.

William P. Ellis for petitioner, Oregon Motor Bus Association, and Earl A. Bagby for defendant, Interstate Transit Company.

At the close of the hearing in this proceeding the Commission made a verbal order dismissing the cause for failure of petitioner to submit sufficient proof of the allegations contained in its petition. As a matter of fact, the hearing developed into a controversy between two competing stage lines and a greater portion of the testimony was an effort to establish that both parties were guilty of violations of law and the present existing rules and regulations of the Commission. Very little, if any, testimony was introduced as to the manner in which the effective requirements of the Commission should be amended, supplemented, modified, or changed and no practical or particular recommendations were offered on which the Commission could base an order establishing and prescribing more definite and specific standards of service, equipment and/or facilities.

Defendant admitted that it had been derelict in its observance of some of the rules and regulations and stated that the situation complained of would be remedied at once. The hearing also brought out other apparent violations of law, such as discriminatory rates, which should receive attention, but there was not sufficient evidence introduced to warrant the Commission in making an order relative thereto at this time. Such matters will require a separate proceeding to fully develop the record.

However, there is one matter which we believe is of sufficient general public concern to require serious consideration by the Commission at this time. Numerous complaints have been received to the effect that some passenger motor carriers doing strictly an intrastate business have refused to transport passengers on the highway to and from intermediate points on their route and that passengers have been forced to stand in inclement weather without shelter awaiting the arrival of a particular stage while unloaded stages have passed by or advised that they were not permitted to pick passengers up between certain points. We believe that the primary purpose of this law is to afford the best possible service to the public and that passengers along the highways are entitled to carriage on the first P.U.R.1928B.

available bus to their destination, provided such bus has unoccupied seats.

- It is hereby *ordered*, that all passenger motor carriers operating exclusively intrastate on regular schedule between fixed termini over the highways of the state of Oregon over noncompetitive routes, or over competitive routes which are served by motor carriers with not less than a twenty-minute headway between schedules in either direction during any one hour at the present time be and they hereby are ordered to file tariffs, schedules, rules, and regulations and provide sufficient facilities to afford transportation to persons and/or property between their extreme fixed termini and all intermediate points on or before ten days from the date of this order.

PENNSYLVANIA PUBLIC SERVICE COMMISSION.

RESIDENTS OF CITY OF POTTSVILLE

v.

POTTSVILLE WATER COMPANY.

[Complaint Docket No. 6440.]

BOROUGH OF PORT CARBON

v.

POTTSVILLE WATER COMPANY.

[Complaint Docket No. 6442.]

CITY OF POTTSVILLE

v.

POTTSVILLE WATER COMPANY.

[Complaint Docket No. 6446.]

BOROUGH OF MECHANICSVILLE

v.

POTTSVILLE WATER COMPANY.

[Complaint Docket No. 6448.]

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BOROUGH OF MOUNT CARBON

v.

POTTSVILLE WATER COMPANY.

[Complaint Docket No. 6450.]

BOROUGH OF ST. CLAIR

v.

POTTSVILLE WATER COMPANY.

[Complaint Docket No. 6451.]

Rates — Reasonableness — Burden of proof.

1. The burden of proof to sustain the reasonableness of increased rates was held to be upon the utility, p. 615.

Discrimination — Free service to municipalities — Legislation — Water utility.

2. A statutory enactment that rates should not be unreasonable or unjustly discriminatory was held to rebut any presumption of any prior legislative authority for free fire service to municipalities, p. 616.

Return — Water utility — Guarantee of return by municipality — Free fire service.

3. In the absence of an express statutory stipulation, there is no presumption that a provision of a statute (P. L. 79 of 1854) requiring municipalities to guarantee dividends to a water utility was meant to be a consideration for free fire service by the utility to the municipalities, p. 616.

Valuation — Expansion caused by extra-charter service — Water utility.

4. Valuation of expansion construction necessitated by service beyond the limits of a utility charter will be allowed in the rate base provided the return from the same is also included and regular consumers are not prejudiced by the extra-charter service, p. 617.

Return — Operating expenses — Taxes — Benefit to stockholders — Water utility.

5. Benefits derived by a utility from continuing under its own charter independent of subsequent constitutions accrue to its stockholders as distinguished from its consumers and any consequent tax burdens caused thereby should be borne by the former, p. 618.

Return — Reasonableness based on facts of record — Water utility.

6. Complaint against a rate structure as a whole will be dismissed where the net income produced by the tariff under attack will not be in excess of that produced by any reasonable rate of return upon such fair value as the Commission might justly find under facts of record, p. 618.

Rates — Meter service — Water utility — Adequate supply.

7. Failure to provide metered service to domestic consumers is not P.U.R.1928B.

unreasonable where the tariff of the utility discloses no discrimination to consumers upon the flat rate basis and the saving of water from such charge would not offset the additional investment and expense of such service, p. 619

[September 6, 1927.]

COMPLAINTS against water utility of increased rates, failure to provide meter service and illegality of rates for fire protection; severally dismissed.

By the **Commission**: [1] The complaints in these proceedings allege in substance that the increased rates of respondent water company to domestic and industrial consumers are unreasonable and that the inclusion in the new tariff of rates for fire protection service is illegal. Complaint is also made of the company's failure to provide in its tariff for metered service to domestic consumers. The complaints were consolidated and heard together, and will be disposed of in one report. The burden of proof in the rate case is upon the respondent.

The Pottsville Water Company, respondent, was chartered by Special Act of Assembly in 1834 (Act of April 11, 1834, P. L. 274) to supply water in the then borough of Pottsville. By this act it was required to erect hydrants to be used solely for the extinguishing of fires, and to connect domestic consumers to its mains. Complainants construe this provision to require respondent to furnish fire protection service free of charge.

The Supplementary Act of February 18, 1854, P. L. 79, added St. Clair, Port Carbon, Palo Alto, and Mount Carbon to respondent's territory and gave the company the same powers and required of it the same duties in these municipalities as in the city of Pottsville. It also directed (§ 3) that respondent's officers file with the borough authorities of Pottsville an account of the money expended by them in the construction of the company's plant, together with annual estimates of income and expenses, and it is then provided,—“and if it shall appear from said accounts and estimates that there will not be sufficient net income from the works of the said company to pay semiannual dividends of 3 per cent on the amount of capital paid in on the subscriptions of stock hereby authorized, . . . the said coun-
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cil is hereby empowered and required to assess on the last county valuation of all property taxable for borough purposes, a tax sufficient to make up any deficiency that may be in the net income of the said company to pay the said semiannual dividends."

The same act requires that before the boroughs of Port Carbon and St. Clair shall be supplied with water the council of each of those boroughs should execute a guaranty similar to that given by the borough of Pottsville.

While it appears of record that the several municipalities have never been called upon to advance any money in compliance with these provisions, complainants contend (1) that by reason of this guaranty the rate of return to which respondent is entitled should be lower than that of other companies working under similar operating conditions; and (2) that this guaranty is intended as a recompense for the free fire service which they construe the Act of 1834 to require, and that, therefore, respondent cannot now be permitted to make a charge for fire protection service.

[2, 3] In our opinion it is not necessary for us to determine whether the Act of 1834, *supra*, required respondent to provide fire protection service free of charge, for it is clear that if such requirement was imposed by the statute, the legislature had the right to subsequently exercise the reserved powers of the Commonwealth whenever the exercise of such powers became proper for the public accommodation and convenience. It exercised these powers when it declared that rates should not be unreasonable or unjustly discriminatory: *White Haven v. Public Service Commission*, 278 Pa. 420, 123 Atl. 772; *Leiper v. Baltimore & P. R. Co.* 262 Pa. 328, P.U.R.1919C, 397, 105 Atl. 551; *Seranton v. Public Service Commission*, 268 Pa. 192, P.U.R.1920F, 661, 110 Atl. 775. Nor is there anything in the Act of 1854 to indicate that the municipal liability is in return for free fire service, and it is obvious that as such service entails an expense to the company it must, if given free or at less than cost, be borne in whole or in part by the rate-payers of the company. This Commission and the appellate courts of the Commonwealth have held such arrangements, which create unjust discrimination against a utility's patrons, P.U.R.1928B.

to be unreasonable: *American Aniline Products v. Lock Haven*, 288 Pa. 420, P.U.R.1927D, 112, 135 Atl. 726. Therefore, the complaint against the tariff charge for fire protection service, must be dismissed.

The Pottsville Water Company, since it began in 1836 to supply water in the then borough of Pottsville, has gradually expanded as the needs of the community grew until it now supplies a territory including the city of Pottsville, the boroughs of St. Clair, Port Carbon, Palo Alto, and Mount Carbon, and parts of Norwegian and east Norwegian townships, an area of about ten square miles with a population of approximately thirty-five thousand.

Respondent's plant consists of four reservoirs now in use and one under construction, together with various in-takes, basins, water-sheds, pipe lines, distribution systems, offices, and other facilities incidental to the supplying of water. The system includes approximately 90 miles of cast iron pipe ranging in size from 6 to 20 inches in diameter, with all equipment. Water is supplied to approximately 9,000 domestic consumers upon a flat rate basis, and to about 300 commercial and industrial consumers on a metered basis. The metered consumption, however, is approximately 700,000,000 gallons per year of the total of about 1,800,000,000 gallons.

As originally incorporated, respondent had a capitalization of \$20,000. The Act of 1854, which extended its territory, authorized an increase in the capitalization to \$200,000. The company has prospered and has accumulated a large surplus, and in 1910 and again in 1920 issued stock dividends of 100 per cent. In 1925 additional stock was issued for cash, bringing the total amount of stock then outstanding to \$1,299,200. The company has no bonded indebtedness.

[4] Both complainants and respondents filed original cost studies, reproduction cost estimates and other data looking toward the determination of the fair value of respondent's plant, used and useful in the public service. These figures differ largely, because complainants' figures omit several items of considerable value on the ground that they represent unwise or illegal expenditures which should not be included in the rate P.U.R.1928B.

base. As complainants point out, respondent's mains connect with those of the Anthracite Water Company and of the Silver Creek Water Company, with which it exchanges water in periods of shortage. It also supplies the Pennsylvania & Reading Railroads with water for their locomotives at points in East Norwegian township, and supplies domestic consumers in this and other townships. In 1922 and 1923 it experienced a material shortage of water and as a result of this condition decided to construct its new Indian Run Reservoir at an estimated cost of \$636,000. Complainants argue that were it not for this supplying of water beyond its charter limits respondent would not have experienced a shortage of water and that, therefore, the construction of this reservoir was an unwarranted expansion for which no allowance should be made in the rate base.

Assuming, for the purpose of the argument, that the service here involved is not authorized by respondent's charter, nevertheless the returns from, as well as the outlay for, the supplying of water in the extra-charter area, have been included in the figures submitted in the case, and it nowhere appears that complainants are prejudiced by respondent supplying water in this area under its present charter. The Commission is, therefore, not disposed to interfere in this matter.

[5] Respondent in its statement of annual expenditures claims the sum of \$31,347 for state taxes. Complainants allow \$6,500 for this item, this sum being an estimate of the amount of capital stock tax, which respondent would pay if it were acting under the present state Constitution, the additional amount which respondent pays in state taxes being wholly due to the fact that it has not accepted the Constitution. Whatever benefits may be derived by respondent from continuing under its own charter independent of the present Constitution, appear to accrue to its stockholders as distinguished from its consumers and, any consequent tax burdens should, therefore, be borne by the former.

[6] Various other claims were made and disputed, upon which testimony was offered. However, inasmuch as the net income produced by the tariff under attack, after deducting a reasonable allowance for operating expenses and depreciation from P.U.R.1928B.

the estimated gross revenue of \$230,000 per annum, will not be in excess of that produced at any reasonable rate of return upon such fair value of respondent's property as the Commission might justly find under the facts of record, there is no necessity for a determination of such fair value, and the complaint against the rate structure as a whole must be dismissed.

[7] As to the further complaint that respondent's tariff makes no provision for metered domestic service, respondent is not now faced with any shortage of water, and it does not appear that any of its consumers suffer any discrimination due to the fact that they are charged upon a flat rate basis, or that the saving of water resulting from such a change would offset the additional investment and annual expense of metered service. The Commission under the circumstances obtaining will not find the respondent's failure to provide metered service to domestic consumers to be unreasonable.

PENNSYLVANIA PUBLIC SERVICE COMMISSION.

BOROUGH OF SUGAR NOTCH

v.

WILKES-BARRE RAILWAY CORPORATION.

[Complaint Docket No. 7127.]

Rates — Street railway — Zones.

A complaint against an alleged discriminatory zoning system of a street railway was dismissed where no evidence of a more practical or fair solution of the operating and traffic condition was shown, giving consideration to the elements of topography, density of population, public accommodation, and other factors which make it impossible to preserve exact uniformity of zone lengths, and where no abuse of managerial discretion was shown.

[December 20, 1927.]

COMPLAINT against a street railway company for unjust, unreasonable and discriminatory fares in a certain zone; complaint dismissed.

By the **Commission**: In this complaint it is alleged that P.U.R.1928B.

the service maintained by the Wilkes-Barre Railway Corporation between the city of Wilkes-Barre and the borough of Sugar Notch is inadequate for the accommodation of the public, and that the fare charged for the service rendered between the two points is unjust and unreasonable. There is nothing in the present record before the Commission, nor in fact in any of the records involving the service of the respondent, which by agreement of the parties were considered by the Commission in connection with this case, to sustain the allegation of inadequacy of service.

The chief question involved is whether the maintenance of two zones between Wilkes-Barre and Sugar Notch is discriminatory against car riders in the borough, and whether the collection of two fares, one for each of these zones, is unjust and unreasonable.

The Commission has made a careful study of the zoning arrangement between Wilkes-Barre and Sugar Notch in relation to and comparison with all the other zones and zoning fares upon respondent company's system. The shortest zone on the Sugar Notch-line is 2.38 miles in length and the average length of the two zones on the line is 2.98 miles. The Plymouth, Edwardsville and Larksville lines are two-zone lines and are all shorter than the Sugar Notch line. The average length of zones on the Sugar Notch line is longer than the average length of zones on the entire system of the respondent company, the system average being 2.89 miles.

It must be obvious that zones on a street railway system cannot all be of exactly the same length. Zoning is determined by operating and traffic conditions, as well as by topography, density of population, public accommodation, and other factors which make it practically impossible to preserve exactly uniform lengths of zone throughout a trolley system.

Some of the zones on the Wilkes-Barre Railway System are longer than the zones on the Sugar Notch line. For instance, the Nanticoke line is 7.64 miles long and the fare is 16 cents as compared with the length of 5.96 miles on the Sugar Notch line and a fare of 16 cents. Conditions upon the two lines are in important respects dissimilar, and there appears to be no way

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in which the respondent could deal with the longer length of zones on the Nanticoke line without upsetting the general system average and creating a decidedly discriminatory condition. The same is true on other and shorter lines on which two zones cover distances of between four and five miles, as against the 7.64 miles of the Nanticoke line embracing two zones. On no line on the system is there a single zone as long as the distance from the public square in Wilkes-Barre to the town hall at Sugar Notch, a distance of 4.76 miles.

The zoning system on the Wilkes-Barre Railway lines has been established and in effect for many years. A careful review of the zoning system has been made by the Commission. This has revealed nothing which is convincing that the zones on the Sugar Notch line are unjustly discriminatory against the patrons of that line or an abuse of the managerial discretion which rests with the company.

PENNSYLVANIA PUBLIC SERVICE COMMISSION.

BOROUGH OF BROOKVILLE

v.

SOLAR ELECTRIC COMPANY et al.

[Complaint Docket No. 7178.]

Consolidation, merger, and sale — Commission power to prevent stock control through holding companies.

1. A Commission has no jurisdiction, under a law (Art. III, § 6, Public Service Commission Law) requiring its approval of the sale of the controlling interest in stock in one utility to another, to prevent the sale of such stock to an individual in the interest of a nonresident holding company also owning the stock of another resident utility which was previously refused permission to buy any of the first utility stock because of an intended acquisition of the same by the borough in which it operated, p. 623.

Municipal plant — Extent of Commission power to aid acquisition of private utility.

2. A certificate of convenience and necessity for a borough to acquire and operate a local electric utility and a refusal of authority to another private utility to buy the capital stock of the same is the ex-P.U.R.1928B.

tent to which a Commission may aid the municipal acquisition of a private utility, p. 624.

[January 3, 1928.]

COMPLAINT by a borough against the alleged evasion of Commission order prohibiting sale of stock by one utility to another; dismissed.

By the **Commission**: This complaint, filed by the borough of Brookville, Jefferson county, against the Solar Electric Company, an electric company operating in that municipality, and the Penn Public Service Corporation, a utility operating in this state, with its principal office at Johnstown, Cambria county, alleges numerous matters to understand which, a brief recital of previous litigation between the parties, is necessary.

In 1924, the Penn Public Service Corporation applied to this Commission for approval of its acquisition of the outstanding capital stock of the Solar Electric Company, and about the same time the borough of Brookville applied to the Commission for approval of municipal acquisition of the plant and works of the Solar Electric Company. The proceedings were consolidated for the purpose of hearing and decision. On November 17, 1926, the Commission issued its report and order granting a certificate of public convenience to the borough's petition to acquire, and refusing the application of the Penn Public Service Corporation. The two utilities concerned appealed to the superior court, and the orders of the Commission were affirmed: Penn Pub. Service Corp. v. Public Service Commission; Solar Electric Co. v. Public Service Commission, 88 Pa. Super. Ct. 369 and 495, respectively.

Thereupon the borough instituted condemnation proceedings in the court of common pleas of Jefferson county under the provisions of the borough code. A judgment was entered by that court in favor of the borough.

The Solar Electric Company appealed to the supreme court, and the judgment of the court below was reversed; the supreme court holding that, although the municipality had the power under the borough code to purchase the plant and works of the

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utility, it did not have the power to condemn: Solar Electric Company's Appeal, 290 Pa. 156, 138 Atl. 845.

[1] While these proceedings were pending, the borough filed the instant complaint, modified by amendments, to which answers were filed. The pertinent facts averred in the complaint and amendments are: that since the issuance of the Commission's certificate of public convenience to the borough, the stock of the Solar Electric Company has been bought by an individual, resident of the city of New York, in the interest of the Associated Gas & Electric Company, a holding company, which also holds the stock of the Penn Public Service Corporation; that the plant of the Solar Electric Company is being operated by the Penn Public Service Corporation, and that the order refusing certificate of public convenience to said company is being violated and said refusal being rendered null and void; that the officers of the Penn Public Service Corporation have endeavored by suggestions of protracted and expensive litigation to put the citizens of the borough under duress and to harass and delay the efforts of the complainant to acquire the plant and works of the electric company. In brief, that all of the joint acts of the two respondents and their intermediaries, detailed at great length in the petition, constitute violations of the Public Service Company Law and the orders of this Commission and that restraining orders should issue to preserve the status quo as of the date of the Commission order, and to require respondents to cease and desist from a continuance of said acts.

In answer the respondents demand proof of the acts alleged by complainant and aver that even if proved they constitute no violation of the provisions of the Public Service Company Law or the orders of the Commission.

Assuming the verity of the complainant's averments, we are unable to see wherein the respondents, or either of them, have violated the provisions of our organic act or the orders of this Commission, and, therefore, we cannot see wherein our jurisdiction attaches. It is not claimed that the property, or a controlling interest in the stock of the Solar Electric Company, has been acquired by another utility, prefatory to which Commission approval would be required under Article III, § 6, of the P.U.R.1928B.

act, but only that the stock has been acquired by an individual in the interest of a nonresident holding company which also owns the stock of the Penn Public Service Corporation.

[2] The certificate of public convenience, issued by this Commission to the borough for the acquisition of the plant of the Solar Electric Company, is still valid and effective, and it is as far as the Commission can now go. Nothing that the respondents in this proceeding are alleged to have done in any wise invalidates the Commission's certificate, and any further procedure on the part of the borough to secure the property of the Solar Electric Company is as available to complainant now as it was when the Commission granted its approval. The request covered by the complaint and amended complaints presents matters upon which Commission action is asked without adequate legal authority to support it. We are, therefore, of the opinion that the complaint cannot be sustained, and that the Commission's certificate furnishes the borough of Brookville all the authority that this Commission can under existing circumstances grant to it. An order will, therefore, issue, dismissing the complaint. [Order omitted.]

PENNSYLVANIA PUBLIC SERVICE COMMISSION.

DEVON PARK HOTEL CORPORATION

v.

WILLIAM T. HUNTER, Trading as Devon Sewer Plant,
Devon Drainage Association, and Fidelity-Philadelphia
Trust Company.

[Complaint Docket No. 7362.]

Public utility — What constitutes — Promoter operating sewerage system.

1. A promoter who, by reason of the failure of a proposed corporation to take over a sewerage system, is in control of the system and actively solicits business, is the operator of a public utility within the meaning of § 1 of the Public Service Company Law, p. 627.

Service — Unauthorized discontinuance for inadequate revenue — Drainage utility.

2. The fact that an involuntary operator of a drainage utility, operating because of the failure of a proposed corporation promotion,
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has been functioning under severe losses, does not relieve him of the obligation to serve the public where he has not submitted himself to the jurisdiction of the Public Service Commission to procure rate adjustments to reduce deficits or to obtain other benefits of the Public Service Law, p. 627.

Public utilities — What constitutes a drainage utility — Real estate development — Public highways.

3. Individuals who construct a sewage system for the purpose of developing land and have made a tappage charge, have constituted themselves a public service company as contemplated by § 1 of the Public Service Company Law, especially where most of the mains in the system are located under public highways, p. 628.

Payment — Liability of previous consumers — Recorded lien — Drainage system — Service discontinuance.

4. A utility cannot place the financial liability of a previous owner or previous tenant upon any subsequent or prospective consumer not in some way identified with the earlier user and for that cause deny service, especially where the premises served have never been charged with any recorded lien arising out of the previous service, p. 628.

Payment — Indemnity bond as condition to service — Drainage utility.

5. Service by a drainage utility to a hotel property was ordered upon condition that present owners file a bond in appropriate form indemnifying the sewage operator against any loss from arrears to the extent of \$1,000 in view of the experience of the utility with former owners and operators of the same property, p. 629.

Parties — Ownership of premises used by utility — Service complaint.

6. A complaint demanding sewage service should be dismissed as to a trust company charged as a co-defendant because of some questionable adverse interest which it has in the premises on which the system is located, on the ground that the question of ownership or title will not be entertained by the Commission where the premises used are in fact under full control of the utility, p. 629.

Parties — Utility corporation never in fact functioning — Drainage utility.

7. A complaint demanding sewage service should be dismissed as to a corporation formed for the purpose of taking over a drainage system which was in fact never turned over to it in any manner or to any extent and to which no proceeds from the system have ever been paid, p. 630.

[January 9, 1928.]

COMPLAINT for refusal to continue sewage service; service ordered to be continued.

By the **Commission**: Complainant is a corporation organized under the laws of Pennsylvania with authority to own and

operate hotels. It owns about fourteen acres of ground at Devon, Easttown township, Chester county, Pennsylvania, whereon is situated a large hotel structure which accommodates a number of guests, both regular and transient. There are about one hundred and twenty guest rooms and accommodations for receptions and dinner parties. It took title to the real estate in question on or about April 30, 1926. It seeks to compel the respondent, William T. Hunter, individually and transacting business as the Devon Sewer Plant and under similar assumed names, to afford its hotel, over his refusal and noncompliance, an outlet into the sewer system operated by him.

The respondent, Hunter, is operating a sewerage and drainage system on gravity principles and affords tappage to a group of about thirty residential properties located in Easttown township, Chester county, south of the Pennsylvania Railroad, in what is known as Devon. The complainant's real estate is contiguous to this group and is located in that same general community.

The respondent, the Devon Drainage Association, was incorporated in 1921 under the name of Devon Drainage Association of Devon, Pennsylvania, but never advanced into the operating stage. Hunter was one of those actively interested in the organization of this corporation.

The respondent Fidelity-Philadelphia Trust Company is the successor by merger of the Philadelphia Trust Company which had, and still apparently has, legal title to about eight acres of land referred to in an option agreement with the Devon Drainage Association, a corporation of the first class, whose charter was granted by the President Judge of Chester county in 1910. The Devon Drainage Association referred to in this agreement never got beyond the stages of incorporation. The respondent Hunter was likewise interested in its formation, but abandoned it because of the limitations contained in its charter. Quite properly it was never made a party to this proceeding. The option agreement referred to was entered into in January, 1920 with this association and certain individuals associated with, or interested in, the project. The arrangement embodied in it was never fully consummated owing to a controversy regarding certain restrictions of record alleged to affect title to the land, P.U.R.1928B.

which we need not go into here. The evidence is clear, however, that Hunter has been in control of that part of the system which is located on this land and has never in any way been interfered with in his operation of it. A similar arrangement was entered into with apparently the same association and the same individuals with regard to approximately four additional acres of land on which part of the system was located; whether this agreement was formal or informal is not quite clear, but there is sufficient information in the record to indicate that there was absolutely no interference in any respect with Hunter in his control and operation of the system as affected by these four acres.

There is no question here as to whether more or less burdensome extensions or improvements are necessary for the purpose of affording the complainant relief. Its predecessors in title were connected with the system and the only change involved in a re-establishment was the unsealing of an obstruction placed at the physical connection by Hunter when he failed to collect from one or more of the former owners, a sum amounting to \$2,875, an item to which we shall again refer. In fact, when the expedient first resorted to by the complainant to take care of the disposal of the sewage from the hotel failed and an offensive condition resulted and became the subject of complaint on the part of the state health authorities, persons acting in behalf of the complainant succeeded in effecting this connection by removing the obstructions, and the sewage from the complainant's property is now passing into the system in question.

[1, 2] Respondent Hunter opposes the efforts of the hotel company first on the ground that he is not operating a public utility. Much of his testimony was reiteration on the point that the original associates in the development of Devon abandoned him in a situation that ensued and that the corporation which he and his later colleagues organized never succeeded in taking over the project and that the matter has always perforce been his personal affair, to his financial and other embarrassment and difficulties. This contention cannot prevail, for § 1 of the Public Service Company Law is clear in this respect. On the element of profits, Hunter developed the fact that the cost to him of operating this sewage system exceeded the amounts

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collected from the property owners to a recent date by some seventy-four hundred dollars. This should not operate to relieve him of public responsibility because it by no means follows that if he had submitted himself to the jurisdiction of the Public Service Commission in this project he would not have procured such adjustments and rates as would have prevented or reduced this so-called deficit. He might, furthermore, have had other benefits intended by the legislation enacting and amending the Public Service Law. Although neither profits nor a balanced budget have resulted from the operation of the system, nevertheless the evidence shows that Hunter solicited and actively held himself out to substantially all the owners of property which might be said to be related to his plant because of its physical and topographical condition. He even contemplated interesting prospective builders on the north side of the Pennsylvania Railroad whose land is not naturally drained in the general direction of his system.

[3] It is also to be observed that the system was not one really intended to relieve a small group of property owners. Hunter's residential and other property in Devon never made any use of the plant. There was some reference to the history of the real estate promotion which finally resulted in a residential community at Devon, but none of this evidence would tend to relieve Hunter. Although the general questions suggested by this history are perhaps not frequently brought before the Commission, nevertheless this is not a novel situation. The Commission decided in *Youngwood v. Dick*, 6 Pa. P. S. C. Decisions, 142 (P.U.R.1923B, 541), that individuals who construct a sewage system for the purpose of developing land and have made a tappage charge, have constituted themselves a public service company as contemplated by § 1 of the Public Service Company Law. Moreover, most, if not all, of the mains in the system have been, and now are, located under public highways.

[4] In the second place, the respondent Hunter resists the demand of the hotel company because he has been unable to collect certain arrearages incurred by one or more predecessors in title to the complainant. These charges aggregated \$2,475. Hunter's contention that the present owner should defray that P.U.R.1928B.

charge as a condition to being afforded access to his sewage system cannot prevail. This Commission has decided repeatedly that a utility cannot place the financial liability of a previous owner or previous tenant upon any subsequent or prospective consumer not in some way identified with the earlier user. *Sanborn v. Springfield Consol. Water Co.* 4 Pa. P. S. C. Decisions, 848 (P.U.R.1921A, 708), and citations therein. It is even more unreasonable to refuse service because of such arrearages where the premises served, or to be served, have never been charged with any recorded lien arising out of the previous service. The evidence is clear that the claim for arrearages in question had never been thus perfected.

[5] It is, therefore, our conclusion that respondent Hunter is operating a public utility and that the claimant corporation is entitled to the relief sought. However, in view of his experience with the former owners and operators of this hotel property, we believe that it is proper to condition the continuance of this service upon the filing of a bond in appropriate form of a recognized surety company with the respondent Hunter, or his counsel, indemnifying him, Hunter, against similar loss, to the extent of \$1,000. This bond or undertaking should run to the respondent Hunter and his legal representatives and to his successors and assigns in the operation of the sewage system involved in this proceeding.

[6] The complaint against the Fidelity-Philadelphia Trust Company is dismissed. The only relation of this respondent to the utility is that embodied in the agreements of 1920. As stated above, there was no interposition in any way on the part of the trust company, and there is evidence on the record to indicate that it has constantly endeavored to give a satisfactory title to the corporations organized by Hunter and his associates. Hunter's right of possession, however clouded, and his tenure for the purpose of operating the plant, were never in the slightest degree interfered with. Where the information before the Commission shows that the premises used in connection with a public utility are in fact in the possession and under the operation of the respondent the question of ownership or title will not be P.U.R.1928B.

entertained by it. *Peters v. Elkwood Sewerage Co.* 5 Pa. P. S. C. Decisions, 297.

[7] The complaint will be dismissed as to the Devon Drainage Association of Devon, Pennsylvania, named in this complaint as the Devon Drainage Association. Letters patent conferring a charter of the second class were granted January 26, 1921, after the Public Service Commission had certified on January 17, 1921, its approval of the beginning of the exercise of the rights, powers, and privileges granted by the incorporation, but the corporation never advanced beyond the stages afforded by these letters patent and this certificate. The evidence is that Hunter himself never turned over any property to it and that none of the proceeds of the operation of the sewage system found their way into the treasury of the corporation or into the hands of any of its representatives.

PENNSYLVANIA PUBLIC SERVICE COMMISSION.

BOROUGH OF CLEARFIELD

v.

CLEARFIELD WATER COMPANY.

[Complaint Docket No. 7027.]

W. A. HAGERTY et al.

v.

CLEARFIELD WATER COMPANY.

[Complaint Docket No. 7039.]

Valuation — Going value — Going or development cost — Water utility.

1. Going cost or development cost is but one of the elements which enter into the determination of going concern value, p. 635.

Valuation — Going value — Factors for consideration — Water utility.

2. A specific allowance was made for going value based on a consideration of the company's history, character of its plant and service rendered, development cost, and other pertinent facts, p. 635.

Return — Percentage allowed — Water utility.

3. A return of 7 per cent was allowed on the present fair value of a water utility, p. 635.

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Depreciation — Annual allowance — Water utility.

4. An annual allowance of \$6,300 for depreciation was permitted on water utility properties valued at \$600,000, p. 636.

Rates — Charge for installing meters — Water utility.

5. A charge for reinstalling water meters, in the absence of an explanation and justification thereof, will not be permitted, especially in view of the general proposition that such charges are a general operating expense, p. 637.

Service — Connections with mains — Conditions — Water utility.

6. A utility rule providing that connections from the street mains to the curb line should be laid only after the applicant for service has completed his line to the curb is unreasonable where the company by control of its own activities in reasonably meeting the requirements for service is sufficiently protected, p. 637.

Service — Seasonal restrictions for extension of service — Water.

7. A company rule that no water service connections will be installed between December 1st and April 1st is unreasonable in view of the vital need for service extensions during all seasons, p. 637.

Service — Expense of investigating service defects — Water utility.

8. A company rule placing upon the consumer the burden of expense in investigating service lines at his request where the defect is found not to exist in the utility's part of the line was held unreasonable in view of the duty of the company, in case of a reasonable doubt, to see that its own lines are functioning properly and in view also of the fact that a service charge is supposed to cover such expense, p. 637.

Service — Water utility rules concerning service equipment.

9. Utility rules providing that negligent damage to equipment during excavations should be paid for by the responsible party, that service should be discontinued where utility equipment has been tampered with and that no plumber or other unauthorized person should disconnect the supply at the utility's stop or molest its meters were all declared unreasonable in so far as they attempted to bind the consumer for liability for the possible acts of third parties, p. 638.

Service — Water utilities — Rules dealing with parties other than consumer.

10. Rules regarding damage to or tampering with service equipment as far as they deal with plumbers and parties other than the particular consumer have no place in a rate tariff, p. 638.

Service — Water utility — Private fire service.

11. Company rules providing that all private fire service must be controlled by meter and imposing other restrictions for use of water passing through such meter for other than fire protection were declared indefinite and unreasonable and a detailed revision suggested by the Commission, p. 638.

Payment — Discount on early payment of bills — Water utility.

12. A utility rule stating that all bills "will be rendered at face and are subject to a discount of 10 per cent if paid by the 15th of the month" was declared indefinite and a revision suggested to provide for P.U.R.1928B.

all bills being rendered at face, to be due at the end of each quarter, subject to a discount of 10 per cent if paid on or within fifteen days after the due date, p. 639.

Service — Water utility — Turn-on-and-off charge.

13. A charge payable in advance for turning on water after shutting off for nonpayment of a bill or any violation of the terms of applications or rules of a water company was substituted for a charge for turning on water after shutting off for nonpayment of bill or any violation of the terms of applications or rules of the company, the same charge being made applicable for turning on or off water at the request of an applicant because of repairs on his premises or on account of a reported vacation or disuse, the services mentioned in the latter part of this rule being covered by the service charge, p. 640.

Service — Water utility — Company — Consumer rules — Extensions.

14. A company rule requiring certain territorial conditions likely to produce reasonable revenue as a condition precedent to the extension of mains and service has no place in rules and regulations providing a working basis for company-consumer relationship which does not exist until service has already been extended, p. 640.

Service — Water — Rules and regulations — "Turn on and off" charge.

15. "Turn on and off" charge is a charge, not a service rate, and should appear in the rules and not in the rates, p. 641.

Service — Water — Rules and regulations — Meter testing.

16. A meter testing charge is not a rate for service and, therefore, should not appear under rates where provided for in the rules, p. 641.

Service — Water — Rules and regulations — Consumers' deposits.

17. A consumer's deposit is not a rate for service and the amount, therefore, should be added to a rule covering the same and eliminated from the rate schedule, p. 641.

[January 23, 1928.]

COMPLAINTS by borough and individuals against increased rates of water utility and against company rules and regulation; rate complaint dismissed, regulation complaint sustained in accordance with opinion.

By the **Commission**: The Clearfield Water Company filed with the Commission a new tariff, P. S. C. Pa. No. 2, increasing rates and revising its rules and regulations governing the distribution of water. The borough of Clearfield filed a complaint against the proposed change for public fire service and the second complaint is directed against both the rate changes and the rules and regulations. Each complaint avers that said tariff will result in a much larger income to respondent company than it P.U.R.1928B.

is entitled to receive as a public service corporation. Both complaints having been filed prior to the effective date of the tariff, the burden of proof is upon the respondent. The complaints were consolidated for the purpose of hearing.

The Clearfield Water Company serves the borough of Clearfield and vicinity, Clearfield county, and began operation about 1882. The original source of supply was Moose Creek, in Lawrence township, on which an intake was constructed. In 1893 the company acquired rights and property on Montgomery Creek in Lawrence and Pike townships on which a second intake was built. In 1900 the Moose intake was abandoned and another one built farther up the stream. In 1902-04 a 52,000,000 gallon and in 1909-10 a 17,000,000 gallon capacity reservoirs were built respectively on Montgomery and Moose Creeks.

The supply lines consist of about seven miles of cast iron pipe ranging in size from 8 to 20 inches in diameter and there are over twenty-five miles of cast iron pipe in the distribution system ranging from 2 to 12 inches in diameter.

The present outstanding capital stock of respondent company consists of \$348,000, all of which represents common stock at \$20 per share, and there is no bonded indebtedness at the present time.

Accounting and engineering investigations of the books and property of respondent company were made and submitted of record.

Respondent submitted \$397,133.50 as the original cost of its property as of September 30, 1926, to which should be added \$6,000 for 16-inch pipe line to Montgomery reservoir as of October 1, 1927, making a total of \$403,133.50. This figure includes the cost of some minor items of property (the aggregate cost of which is about \$20,000) which are not at present used and useful in the public service.

The parties submitted estimates of reproduction cost new and depreciated. The inventory was as of October, 1926, respondent's pricing was of that date; while complainants' pricing was as of June 1, 1927. Their estimates of record were

Respondent, \$925,476 new, \$803,379 depreciated.

Complainant, \$583,576 new, \$413,344 depreciated.

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The parties differ materially as to unit prices, used and useful property and overheads. Complainants' estimates also were based upon the cost of leadite instead of lead in pipe joints.

In the reproduction cost new estimates, the parties are in agreement on rights of way and water diversion rights in the water collection system; rights of way, wrought iron specials, valves, difficult crossings and meters in the distribution system; and land, office building, and general equipment.

Complainants' estimate contained no allowance for the old unused intakes in Moose and Montgomery Creeks, or for the distribution reservoir, not now used, and the land upon which it is constructed. In the light of the evidence the Commission will disallow these items.

Respondent owns land on the watershed devoted to water collection purposes which it values at \$4,461. Complainants allow \$2,487 for this item. The Commission will allow respondent's estimate for the value of this land.

For impounding reservoirs, complainants agree with respondent on the inventory relative to the Moose Creek reservoir but differ on several of the inventoried items of Montgomery reservoir and also differ relative to the unit prices. The Commission will accept respondent's unit prices as reasonable and also their inventory with the exception of the item of rolled embankment in the Montgomery reservoir for which item the evidence indicates complainants' allowance of 40,000 cubic yards to be correct.

Respondent's estimates for supply lines from Moose and Montgomery reservoirs total \$124,324.63 and complainants' after adjusting for a river crossing total \$98,512.40. The difference being due to unit prices and differences in inventory for rock excavation on which both parties agree as to unit prices. The Commission will allow respondent's estimate as reasonable.

The parties substantially agree on the inventory for cast iron mains and specials, wrought iron mains and difficult excavation in the distribution system but they differ largely in the application of unit prices for this class of property. Respondent's estimate for reproduction new of these four items is \$244,760.76; and complainants' estimate is \$196,609.64. The Commission P.U.R.1928B.

determines that the reproduction cost new value of these four items of property is \$242,069.76 for the used and useful property.

For service lines and fire hydrants respondent's and complainants' estimates of reproduction cost new are \$46,581.15 and \$25,020, respectively. The parties differ in inventory and unit prices. After a careful study of these items the Commission will include \$27,370 in its estimate for these items.

For materials and supplies and cash working capital, respondent claims \$11,415.19 and complainants allow \$5,107. Complainants disallow a number of items in materials and supplies. The Commission will allow \$10,415.19 as a fair figure for these items.

The Commission, after giving due consideration to the elements of overhead costs, finds that respondent's percentages are fairly reasonable and when so applied by the Commission, excluding cost of financing, approximate closely to 15 per cent.

[1, 2] For going cost respondent claims \$67,000 and complainants allow \$17,400. These figures represent the parties' estimate of the cost of developing the business now attached to respondent's plant. Going cost or developmental cost is but one of the elements which enter into the determination of going concern value. From a consideration of the company's history, character of its plant and service rendered, developmental cost and other pertinent facts, the Commission finds that the going concern value of respondent's plant, in addition to the value of the physical property, is \$35,000.

The Commission finds a reproduction cost new of property in use on October 1, 1927, at prices current on October 1, 1926, the date used in respondent's estimate, including a going concern value of \$35,000 and \$17,000 for the new 16-inch pipe line recently installed, is \$792,000 and the same depreciated is \$717,000.

[3] Respondent claims \$760,000 and complainants claim \$348,000 as their bases for predicated rates. Through check and correction of the estimates and unit costs submitted by complainants and respondent, and giving consideration to the evidence and taking into account all the facts and circumstances, P.U.R.1928B.

the Commission finds that the present fair value of respondent's property used and useful in the public service is \$600,000, upon which a 7 per cent return will be allowed.

[4] Respondent's engineer estimates \$10,000 for annual allowance for depreciation, and complainants' engineer deduces \$7,800 for this purpose. By the application of the same method by which the accrued depreciation on the plant has been determined, the Commission finds that an allowance of \$6,300 will be sufficient to take care of annual depreciation.

Respondent's original estimate of revenues from the new tariff was \$62,408 and a subsequent exhibit showing the actual revenues for a half year, January 1 to June 30, 1927, indicates approximately \$69,450 as the revenue to be derived from the present tariff which figure the Commission will use for its present purposes.

For operating expenses, the estimates of the parties (exclusive of state capital stock and Federal income taxes) lack \$500 of being in agreement. The company claims \$7,800 for said taxes. The Commission is of the opinion that respondent's estimate of \$13,215 for operating expenses and \$7,800 for taxes is not excessive and will allow these amounts.

From the foregoing findings and determinations the Commission concludes that a fair annual gross revenue for the respondent should not be in excess of \$69,315 determined as follows:

7% return on \$600,000	\$42,000
Annual operating expense	13,215
Annual allowance for depreciation	6,300
Taxes	7,800
Total	\$69,315

This amount being practically equal to the anticipated revenue from the present tariff P. S. C. Pa. No. 2, the Commission finds the revenue produced by said tariff is not excessive.

There is no evidence in the record relative to the rates being discriminatory or unbalanced, nor is there any evidence in the record relative to the increased rate for public fire protection being unwarranted or unjust, and the Commission of its own general knowledge is not convinced that this rate is unfair or unreasonable *per se*.

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The Commission finds that several of the rules and regulations contained in the tariff complained against are unreasonable and should be revised or eliminated as hereinafter indicated.

Reinstallation of Meters (p. 4).

[5] The tariff contains a charge for reinstalling meters 1 inch or smaller—\$2; larger than 1 inch—\$5. There is nothing in the rules to indicate when this charge is applicable and as a general proposition it seems that such charges should properly be a general operating expense. Unless this charge can be clarified and justified it should be deleted from the tariff.

Service Lines (p. 5).

[6, 7] Rule 3 provides that connections from the street main to the curb line, including cock and stop, will be laid only after the applicant has completed his service line to the curb line. No service connections will be installed between December 1st and April 1st. The first requirement is unreasonable in that the company by control of its own activities in reasonably meeting the requirements for initiation of service, is sufficiently protected without binding the consumer by any such technicality. The latter requirement is unreasonable in that the need for service connections requested in the period from December 1st to April 1st may be just as vital and urgent as any made at other periods of the year and should occasion demand it the consumer is entitled to be accommodated reasonably. Both of these requirements should be eliminated from the rule.

Renewal of Service Lines.

[8] Rule 12 provides that if a consumer claiming faulty water service shall request the company to investigate the cause of the trouble in the portion of the service connection owned by the company, mainly between the street main and the curb line, and if upon such investigation the trouble is found not to be in said mentioned portion of service connection, then the consumer shall pay all costs which have been incurred by such investigation.

The duty of the company is no less to see that its portion of a service line functions properly than any other part of its facility.
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It does not necessarily follow that the company is obligated to investigate its portion of a service line upon a consumer's request particularly if it already knows that such facility is in proper operating condition. However, if this fact is not definitely known the least the company should do would be to find out. It is generally considered that a portion of a service charge is to cover consumer's costs which arise out of such situations as this. For this reason and other reasons pertaining to company-consumer relationship this rule should be eliminated.

Renewal of Service Lines and Discontinuance of Service.

[9, 10] Rule 14 provides that all injury to service pipes or street mains caused by careless or negligent work or improper filling of excavations for any purpose shall be chargeable to the person so causing such injury and the expense of repairing the same shall be recovered from such person.

Rule 15 (g) provides for discontinuance of service for molesting any service pipe, meter, curb-stock cock, valve seal, or any other appliances of the company controlling or regulating the water supply.

Rule 17 provides that no plumber, owner, or other unauthorized person shall turn the water on or off at any corporation stop or curb stop, fire hydrant, or disconnect or remove the meter without the consent of the company. Violations are subject to the penalties imposed by law.

In so far as these rules bind the consumer for liability for possible acts of third parties they are unreasonable, in so far as they apply to other parties, they have no place in the tariff. The rates, rules and regulations should control company-consumer relationship only and the company has full protection by law for the specific instances covered by these rules. They should be eliminated.

Private Fire Service.

[11] Rule 26 provides that all private fire service will be controlled by meter and a proper and accessible place for setting same shall be furnished by the owner. Private fire service lines will be installed by the company from the main to the curb.

Rule 27 provides that all water passing the meter shall be P.U.R.1928B.

paid for at the regular meter rates of the company except water used in the extinguishing of the fire for which no charge will be made if notice is given to the company so that the meter can be read promptly; that water shall not be taken for any other purpose unless specially permitted by the company; that no service pipe for private fire service installed in the future shall be larger than 6 inch; and that no cross connection shall be made with the general supply line.

These rules are apparently indefinite and unreasonable. They should be revised somewhat as follows:

Such private fire protection as a consumer may elect to use through his general service line, provided the general service is at metered rates, shall not be considered as private fire service within the meaning of the term as specifically used in the rate schedule and rules, nor shall there be any charge for such service other than arises from the application of metered rates service charge and consumption charge.

Other private fire service (meaning such private fire service as does not come within the provisions of Rule 26) shall be furnished only at the rates established under "Private Fire Service" and subject to the following rules:

(a) A service line with shut off valve for this specific service only will be installed by the company from the main to the curb, and the company may elect to install a meter on said service for purposes other than a basis of charge for service, and if the company so elects the consumer will provide a suitable accessible place to set the meter on the line at the nearest reasonable site beyond the curb line.

(b) Water shall not be taken from a private fire service line for any other purpose.

(c) No connection or cross connection shall be made between consumer's private fire service facilities and any point of opening communication with company's facilities other than the company's private fire service line, or to any other independent source of water supply without approval of the company.

Bills Due and Payable.

[12] Rule 30 provides that all bills will be rendered at face P.U.R.1928B.

and are subject to a discount of 10 per cent if paid by the 15th of the month. This rule the Commission believes too indefinite and it should be revised to read as follows:

All bills will be rendered at face, and due at the end of each quarter ending . . . , and are subject to a discount of 10 per cent if paid on or within 15 days after the due date.

Turn-on-and-off Charge.

[13] Rule 34 provides that the payment for turning on water after shutting off for nonpayment of bill or any violation of the terms of applications, or rules of the company, shall be as shown on page 4 under "Turn-on-and-off Charge," which shall be paid in advance. The same charge will be made for turning on or off water at request of applicant due to repairs on his premises or to reported vacation or disuse.

A paragraph similar to the following should be substituted for this rule:

A charge of \$2 payable in advance for turning on water after shutting off for nonpayment of bill or any violation of the terms of application or rules of the company.

The second part of this rule should be eliminated as the Commission considers this to be a part of the company's service duty covered in the consumer-service charge.

Extensions.

[14] Rule 37 provides that the company will extend its mains of proper size considering future growth and additions within its charter territory on public roads, streets, and lanes upon application when a reasonable revenue is assured. This rule has no place in the rules and regulations, which provide a working basis for company-consumer relationship and until service is initiated no such relationship exists. For this reason the rule should be eliminated.

Rates.

The attention of respondent is called to the fact that the following items appear under incorrect headings in the tariff and should be rearranged accordingly.

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(1) Public fire service (p. 3 of tariffs) is a flat rate rather than a meter rate.

(2) Private fire service (p. 3) is discussed above and is also a flat rate service.

[15] (3) Turn-on-and-off charge (p. 4) is a charge—not a rate for service—and should not appear in the rates but should be incorporated in the rules.

[16] (4) Rate for testing meters (p. 4) is not a rate for service and, therefore, should not appear under the rates. Rule 25 provides for such testing of meters.

[17] (5) Deposits (p. 4) likewise is not a rate for service. Rule 33 provides for consumers' deposits and the amount required should be added to that rule and eliminated from the rate schedule.

RHODE ISLAND PUBLIC UTILITIES COMMISSION.

RE UNITED ELECTRIC POWER COMPANY.

[No. 173, Order No. 1195.]

Security issues — Duty of Commission — Legislative determination of finance policy.

1. It is the duty of the Commission to proceed with the functions assigned to that body by the General Assembly where the latter has determined the question of policy in regard to the purpose of security issues, p. 643.

Security issues — Purpose — Accomplishment of legislative intent.

2. Capitalization of such expenditures as appear to have been prudently made and reasonably necessary in the accomplishment of the purposes set forth in the charter of a company consolidating power utilities should be permitted, provided they do not exceed the fair value of property acquired, p. 643.

Valuation — Reproduction cost new — Security issues.

3. The cost of reproduction new less depreciation was considered only for the purpose of determining whether the amount of capitalization for which authorization was sought bore a relation to or was in excess of its fair value, p. 644.

Security issues — Capitalization of bond discount.

4. A discount incurred in the sale of collateral trust bonds may properly form a basis for the issue of capital securities where evidence establishes that the discount transaction was prudent and resulted to
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the advantage of the company under the market conditions at the time of the issue, p. 646.

Security issues — Purpose — Achievement of charter authority — Proper expenditures — Electric utility.

5. Proper and legitimate expenditures made necessary in accomplishing the results authorized by a charter, such as incorporation fees, stamps, legal, engineering, banking and brokerage services, advertisements and other expenses incidental to the sale of securities may all form a proper basis for the issue of capital securities, p. 646.

Valuation — Cost of reproduction — Land values — Security issues.

6. The proper application of the cost of reproduction theory to land is a determination by appraisal of the value of each parcel of land in accordance with the market value of other land similarly situated in the same locality and enjoying similar improvements without regard to the purposes for which it was used, with the addition of a broker's commission and an adequate amount for other transfer costs, p. 648.

[October 28, 1927.]

PETITION of electric utility for authorization of issue of bonds and capital stock; original petition denied, issue authorized with restrictions.

Appearances: Edwards and Angell, Ropes, Gray, Boyden & Perkins, for petitioner.

By the **Commission**: This is a petition of the United Electric Power Company, filed with the Commission on June 13, 1927, and which as amended on September 1, 1927, asks for the approval by the Commission of the issue of securities to enable the petitioner to acquire the franchises and physical assets of the Narragansett Electric Lighting Company and its properties, together with all shares of stock of Rhode Island corporations owned by the Narragansett Electric Lighting Company and all working capital, stores, and supplies and also all other property, rights, claims, and assets used or useful in the operation of its business in the state of Rhode Island under authority of its charter, "An Act to Incorporate United Electric Power Company," enacted by the general assembly of the state of Rhode Island at its January Session, A. D. 1926, as amended by said general assembly at its January Session, A. D. 1927.

Hearings on this petition were duly advertised and held before the Commission on June 28, 30, July 1, 2, 5, 7, 13, 25, 26, 28, 29, and August 4, 1927.

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The petitioner produced Mr. Dugal C. Jackson of Messrs. Jackson & Moreland, engineers of Boston, who presented his appraisal of the properties now owned or controlled by the Narragansett Company, testified at length concerning his appraisal and introduced numerous exhibits. In addition to Mr. Jackson, the following witnesses appeared for the petitioner: John B. Carpenter, who testified and introduced exhibits concerning the value of the real estate owned or controlled by the Narragansett Company; W. Eugene McGregor and J. Howard Leman, who testified as to the various financial and banking matters involved in the cost of reproduction new of the properties, and William C. Bell, who testified as to the new construction of the Narragansett Company between May 1, 1927 and January 1, 1928.

The jurisdiction of the Commission in this matter is conferred by the provisions of § 7 of "An Act to Incorporate United Electric Power Company" approved April 8, 1926, which reads as follows:

"Section 7. All issues of stocks, bonds or other obligations of the company hereby incorporated (except obligations maturing within twelve months of the date of issue), the purposes of said issues and the manner and terms upon which they are to be disposed of shall be subject to the approval of the Public Utilities Commission, and such stocks, bonds and other obligations shall not be valid without such approval; provided that not exceeding fifty thousand dollars par value of stock may be issued for cash at par and shall be valid without such approval."

[1] The question of policy in regard to the purpose of the issue of the securities for which the petitioner is seeking approval was a matter for determination by the General Assembly, and that body having determined the policy, it becomes our duty to proceed with the functions assigned to the Commission.

[2] The Commission is of the opinion that it was the intent of the legislature that the capitalization of the United Electric Power Company should not exceed the expenditures prudently made for the acquisition of the Narragansett Electric Lighting Company, together with its subsidiary companies, and their amalgamation into the new company, as authorized by the charter granted by the General Assembly.

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If such expenditures appear to have been prudently made and to have been reasonably necessary in the accomplishment of the purposes set forth in the charter authority, capitalization of the same should be permitted, provided they do not exceed the fair value of the property so acquired.

[3] For the purposes of this petition we have considered cost of reproduction new less depreciation only for the purpose of determining whether the amount of capitalization for which authorization is sought bears a fair relation to or is in excess of its fair value.

We, therefore, proceed to a determination of the probable cost of acquisition of these properties.

The method of acquisition was indicated with the fullest publicity and it would appear that the entire outstanding stock of the Narragansett Electric Lighting Company amounting to 470,016 shares of a par value of \$50, 99½ per cent has been acquired at a price of \$87 per share. The entire issue at this price will have cost \$40,891,392.

It appears that the properties of the Westerly Light & Power Company and the Narragansett Pier Light & Power Company have outstanding mortgage bonds constituting an underlying lien on the properties of these companies amounting to \$360,500, hence this sum constitutes an element of cost in the acquisition of the properties.

Mr. William C. Bell, general manager of the company, testified that capital additions to the plant of the Narragansett Electric Lighting Company and subsidiary companies, from January 1, 1927 to April 30, 1927, were \$319,259 and that further capital expenditures to January 1, 1928, were estimated at \$663,800.

It further appeared that the Seekonk Electric Company, a subsidiary operating in Massachusetts, was indebted to the parent company for \$108,000 represented by notes, that the parent company held \$1,000 of stock of the Atlantic Power Company, and \$2,767, for cash sinking fund of the South County Public Service Company, making a total of \$111,767 as miscellaneous capital items. The addition of the above items to the cost of the stock makes a total of \$42,346,718.

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The entire capital stock of the petitioner at present issued and outstanding is owned by the Rhode Island Public Service Company, a corporation organized under the General Corporation Law of the state of Rhode Island. The service company also owns all of the stock of the Narragansett Company, a corporation organized under the General Corporation Law of the state of Rhode Island, which in turn owns over 99½ per cent of the stock of the Narragansett Electric Lighting Company and has outstanding \$27,500,000 principal amount of collateral trust 30-year 5 per cent bonds, secured by the deposit of the stock of the Narragansett Electric Lighting Company. These collateral trust bonds contain a provision whereby mortgage bonds secured upon all franchises and physical assets owned by the Narragansett Electric Lighting Company on August 1, 1926 and all franchises and physical assets subsequently acquired (except franchises and physical assets disposed of, for which additional property of at least equivalent value has been substituted) and all shares of subsidiary corporations (defined to include only Rhode Island corporations) owned by the Narragansett Electric Lighting Company on August 1, 1926 or in lieu of such stock the physical assets and franchises of such subsidiary companies may be substituted therefor upon certain terms and conditions specified in the collateral trust indenture. The primary purpose of this petition is to permit the substitution of such mortgage bonds for the collateral trust bonds, making possible the dissolution of the Narragansett Company and providing for the lighting enterprise a more economical vehicle for future financing than the issue of additional collateral trust bonds would afford. This would not result in any change of control and would only affect the securities in the hands of the public by substituting mortgage bonds for collateral trust bonds.

The Narragansett Electric Lighting Company owns all of the capital stock of a number of Rhode Island Corporations. The only one of these, however, which has any assets, not included in the appraisal of properties of the Narragansett Company, which were considered of material value for the purpose of this petition is the South County Public Service Company, which, in turn, owns all the stock of the Mystic Power Company, a Con-
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recticut corporation. The assets and property of these two corporations have therefore, been considered herein as the measure of value of the stock of the South County Public Service Company which the petitioner proposes to acquire.

[4] The \$27,500,000 of 5 per cent collateral trust bonds of "The Narragansett Company" above referred to were sold at 95, resulting in a discount on these bonds of \$1,375,000. The testimony established the fact that, although this discount was incurred, the transaction was prudent and the results to the advantage of the issuing company under the market conditions at the time of issue. Under these circumstances we are of the opinion that this may properly form a basis for the issue of capital securities. The addition of this item brings the total of expenditures up to \$43,721,718.

[5] There are certain other proper and legitimate expenditures made and necessary to be made in bringing about a completion of the results authorized by its charter. Some of these may be enumerated as incorporation fees, stamps, legal services, engineering services, banking services on exchange of stocks and bonds, necessary publicity and advertising, including general advertising throughout the East in connection with the sale of the collateral trust bonds, printing of plans for submission to stockholders, together with the revised plans, the printing of bonds, both collateral trust and the first mortgage bonds proposed to be later issued in substitution, and legal services in passing upon these bond issues. It is clear that the aggregate expenditure for the above purposes will be substantial, and may be conservatively estimated at an amount in excess of \$400,000.

It appears to be extremely desirable, both from the standpoint of the interest of the petitioner as well as of the public, that the amount of the bond issue to be authorized should be \$27,500,000 in order that the exchange of a like amount of the collateral trust bonds may be effected in an orderly manner and without confusion.

The total expenditures excepting the last item aggregate \$43,721,718. A deduction of the \$360,500 of underlying bonds, when made, leaves \$43,361,218, from which the authorization of P.U.R.1928B.

\$27,500,000 of bonds being deducted, there remains \$15,861,218 for which stock might be properly authorized, to which must be added a proper estimate for expenditures of the general nature above mentioned.

We are of the opinion that a total of \$16,300,000, or 326,000 shares at \$50 par, may properly be authorized, this leaving \$438,782 as the estimate for general expenses.

We now proceed to compare the above estimate of cost with the results arrived at by Mr. Jackson and by Mr. Sloan.

It would serve no useful purpose to set forth in this opinion the detailed estimates contained in the reports of the two engineers, as they appear in full detail in their reports and exhibits in the case. As modified by their evidence, the changes in appraisals are fully set forth in Appendix A of the brief of the petitioner, where exact comparisons may be made, and to which we specifically refer.

Mr. Jackson's total includes an estimate of organization cost and interest thereon amounting to \$1,593,248, an item of \$4,600 intangible investment represented by the franchise of the Providence Steam Company, and an item of \$2,260,590 for cost of financing, which items have not been included by Mr. Sloan, all of these items totaling \$3,858,618.

Mr. Jackson's estimate of present value excepting the above items is \$44,203,443 as of January 1, 1927, and including these items \$48,062,061. To these are added the new construction items of \$319,259 and \$663,800 to April 1, 1927 and January 1, 1928 respectively, and the items of \$111,767 for notes of the Seekonk Electric Company, etc., above referred to, making a grand total of \$49,156,887. From this total is deducted \$360,500 representing the mortgage bonds of the Westerly and Narragansett Pier Companies, outstanding leaving \$48,796,387, which the petitioner seeks authority to capitalize, \$27,500,000 by bonds, and \$21,296,387 by common stock.

Mr. Sloan's estimate of present value is \$41,854,051 as of January 1, 1927.

Additions to plant \$319,259 and \$663,800 and the Seekonk P.U.R.1928B.

Electric Company notes, etc., above mentioned, bring this total to \$42,948,877 as of January 1, 1928.

To this estimate there are added the items of \$1,375,000 as discount on bonds, and the estimated amount of general expenses \$438,782, making a grand total of \$44,762,659. From this total is deducted \$360,500 representing the mortgage bonds of the Westerly and Narragansett Pier Companies outstanding, leaving \$44,402,159, from which, if the \$27,500,000 of bonds proposed is deducted, there remains a balance of \$16,902,159 for common stock.

A comparison of the estimates of Mr. Jackson and Mr. Sloan with the estimated cost as determined by the Commission is set forth in the following table: [Table omitted.]

We have heretofore expressed the opinion that present value should not constitute the basis for authorization of the issue of capital securities in a case of this nature. In a rate-making case a different situation would exist, and the amount of bonds and stock outstanding would constitute but one of numerous factors which would have to be considered in the determination of the fair value, or rate base.

The case was presented by the petitioner, however, upon the theory that present value should constitute the measure of capitalization, and the matter of present value was quite thoroughly presented in evidence.

[6] In the matter of land values, we believe that a proper application of cost of reproduction theory is a determination by appraisal of the value of each parcel in accordance with the market value of other land similarly situated in the same locality and enjoying similar public improvements, but without regard to the purposes for which the property is used. To this should be added the broker's commission which usually obtains where such land is located, and an item of 1 per cent for other transfer costs, which we believe to be amply adequate for such costs under the testimony in this and other cases. The petitioner set up 2.8 per cent as an estimate of other transfer costs.

As to the remainder of the physical assets before overheads, after a careful examination of the evidence and exhibits, we feel inclined to adopt the figures of Mr. Sloan as to reproduction cost
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and present condition, the latter figure amounting to \$31,071,499 as compared with Mr. Jackson's estimate of \$31,905,939, Mr. Sloan's estimate being less by \$834,440.

(Petitioner's Brief Appendix "A".)

In the matter of overheads it will appear from the following table that the claim of such values on the part of the petitioner, bases upon the estimates and exhibits presented by Mr. Jackson, is for an excess of 50.6 per cent over the value placed by him upon the physical plant. The estimate of Mr. Sloan for these items amounts to 34.7 per cent of the value which he placed upon the physical plant.

If the expense incurred through discount on bonds and the general expenses incurred and to be incurred as estimated by the Commission are added, this percentage will be increased to 40.5 per cent, which appears to us as fully compensating all of the overhead values that may be properly claimed in a proceeding of this nature.

[Table showing comparison between estimates of physical assets and overheads omitted.]

This petition was filed with the Commission on the 13th day of June, A. D. 1927, a public hearing was held on the same on the 28th day of June, A. D. 1927 and at the several adjournments thereof, testimony of witnesses was presented and arguments of counsel were heard, and thereupon and upon consideration thereof, it appearing to the Commission (1) that notice has been given of the pendency of the said petition as required by order of the Commission heretofore entered; (2) that United Electric Power Company is, under the provisions of its charter, entitled to the approval of such securities as may be reasonably required for the purposes set forth in its petition; (3) that the amount of stock (425,926 shares) requested in said petition is excessive and should, therefore, be disallowed, and that the amount of bonds and stock hereinafter approved may be reasonably issued for the purposes hereinafter provided.

Now therefore, it is *ordered* that the approval of the Public Utilities Commission be and the same is hereby granted for the issue by United Electric Power Company of (a) first mortgage, 30-year, 5 per cent gold bonds, Series A, of United Electric Power Co. P.U.R.1928B.

er Company, to mature January 1, 1957. to the principal amount of \$27,500,000, and (b) 326,000 shares of its capital stock to be issued at not less than par, in addition to the 892 shares already issued for cash under the provisions of § 7 of an act entitled "An Act to Incorporate United Electric Power Company," passed by the general assembly of the state of Rhode Island at its January Session, A. D. 1926, and any amendments and additions thereto, for the purpose of acquisition by United Electric Power Company of all the franchises and physical assets of the Narragansett Electric Lighting Company, together with all shares of stock of Rhode Island corporations owned by the Narragansett Electric Lighting Company, and all working capital, stores, and supplies, and also all other property, rights, claims, and assets belonging to said company and used or useful in the operation of the business of said company in the state of Rhode Island, and to make payment of any notes to be given in part payment of the purchase price therefor, or of any liabilities and obligations of the Narragansett Electric Lighting Company which may be assumed by United Electric Power Company as part of said purchase price.

And it is *further ordered* that United Electric Power Company shall file with this Commission a report setting forth the number of shares of stock issued by it pursuant to the authority of this order, and the disposition of the proceeds of the said bonds and said shares of stock.

ARKANSAS SUPREME COURT.

STATE

v.

JOHN W. HAYNES, Junior et al.

[No. 24.]

(— Ark. —, 300 S. W. 380.)

Service — Automobiles — Designation of terminals — Stations.

1. Whether the station at which passengers or freight are loaded and unloaded is inside or outside of the corporate limits of cities or
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towns along a bus route is immaterial since the provisions of an act (Acts of 1927, p. 257, § 1) providing for the authorization of motor vehicles "between cities or towns" operate to designate only the terminals of the line or route to be authorized, p. 653.

Certificates of convenience and necessity — When required — Irregular taxicab service.

2. An occasional trip of a taxicab operator, usually operating within a certain city, beyond the limits of such a city in order to deliver passengers, does not bring him within the provision of an act placing the operation of motor carriage for hire between cities and towns within the regulatory jurisdiction of the Commission, p. 654.

Certificates of convenience and necessity — When required — Sight-seeing busses.

3. The operator of a sight-seeing bus in commencing his tour from a certain point and making a circuit of points of scenic interest without touching cities or towns, always terminating in the place of origin, does not thereby come within the provisions of an act (Acts of 1927, p. 257, § 1) providing for the regulation by the Railroad Commission of motor carriage between cities and towns, p. 654.

Certificates of convenience and necessity — When required — Golf links taxicab service.

4. The operation of taxicabs from a hotel in a city to a golf course about three miles outside of the corporate limits thereof with no intervening cities or towns does not come within the provision of an act (Acts of 1927, p. 257, § 1) providing for the regulation by the Railroad Commission of motor carriage between cities and towns, p. 654.

[December 5, 1927.]

APPEAL by the state from a judgment of not guilty on indictments of two taxicab and one sight-seeing bus operators charging them with the violation of a statutory provision for the regulation of such motor transportation by the Railroad Commission; judgment of lower court affirmed.

Separate indictments were returned against John W. Haynes, Jr., Alf Shick, and Porter W. Austeel, charging them with a violation of the provisions of an act passed by the legislature of 1927 placing commercial motor transportation under the Arkansas Railroad Commission under certain conditions.

Under the agreed statement of facts, John W. Haynes, Jr., is the owner of a motor vehicle commonly called a taxicab, and occupies a stand on one of the streets in the city of Hot Springs, Garland county, Arkansas, under an ordinance passed by the city council. He has paid the state highway department for a license for his car, as required by statute, and has paid to the city P.U.R.1928B.

of Hot Springs the license fee provided by ordinance for operating a taxicab upon the streets of said city. Haynes does a general taxicab business in said city, and also accepts passengers for hire to be delivered to points outside of the city limits of Hot Springs, but he does not operate his taxicab over a fixed route between different towns or points.

According to the agreed statement of facts, Alfred Shick is the owner of a motor-propelled vehicle commonly known as a sight-seeing bus, and maintains a stand on one of the streets of the city of Hot Springs under the provisions of a city ordinance. He has paid the license fee to the state highway department required by statute, and has paid to the city of Hot Springs the license fee required by ordinance for operating said sight-seeing bus in said city. He carries passengers in his sight-seeing bus to points in and outside of said city, including Remmel Dam and certain springs which are specifically named. None of these places, however, are cities or towns, and, in making the sightseeing trip, the defendant does not pass through any city or town. He operates his bus over no regular circuit on the highways of the state.

According to the agreed statement of facts, Porter W. Austeel is the owner of a motor-propelled vehicle commonly known as a taxicab, and maintains a stand on one of the streets of the city of Hot Springs under an ordinance of said city. He has paid to the state highway department the license fee required by statute, and also has paid the license fee required under the ordinance of the city of Hot Springs for operating his taxicab in said city. He does a general taxicab business in said city, and also operates a taxicab between the hotels of the city of Hot Springs and the Hot Springs Country Club, which is a distance of about three miles from said city. In going to and from the city of Hot Springs to the golf course at said country club he traverses no town or city, and the Hot Springs Country Club is not a town or city.

In each case the circuit court was of the opinion that the provision of the statute under which the indictments were returned had not been violated, and judgment was rendered accordingly. P.U.R.1928B.

From the judgments rendered, an appeal to this court has been duly prosecuted in each case by the state.

Appearances: H. W. Applegate, Attorney General, and Hal L. Norwood, Assistant Attorney General, for the state; A. T. Davies, of Hot Springs, for appellees.

Hart, C. J.: (after stating the facts as above). [1] The three cases have been consolidated for the purposes of appeal, and involve the construction of Act 99, approved March 4, 1927. Acts of 1927, p. 257. Under § 1 of the act there is a proviso that the term "motor vehicles" or "motor-propelled vehicles," as used in the act, shall only include a motor vehicle operating a service between cities or towns. The section, also, provides that the term "improved public highway," wherever used in the act, means every improved public highway in the state which is, or may hereafter be, declared to be a part of the state highway system, or a county highway system or the streets of any city or town. The act contains fourteen sections, and provides that every corporation or person operating motor vehicles within the terms of the act shall procure a license therefor from the Arkansas Railroad Commission, and comply with the reasonable rules and regulations prescribed by said Commission. Section 8 makes it a misdemeanor to operate a motor vehicle as provided in the act without first securing a permit from said Commission. Section 10 provides that no city or town shall impose any tax or license upon a motor vehicle carrier licensed under the provisions of the act. Other provisions of the act show that it was the intention of the framers of it to apply it to motor vehicles being operated over fixed routes, and as a common carrier of passengers or of freight.

It will be noted that subdivision (d) of § 1 contains the following:

"Provided, the terms 'motor vehicle' or 'motor-propelled vehicles' as used in this act shall only include a motor vehicle operating a service between cities or towns."

Other provisions of the act show that the motor vehicles coming within its terms are common carriers which operate over a fixed route.

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We are of the opinion that the term "between cities or towns" is used to designate the termini of the line or route, and it would not make any difference whether the station at which passengers or freight are loaded and unloaded were within the corporate limits or just outside the corporate limits of the cities or towns which are the termini of the route.

In *Murray v. Menefee*, 20 Ark. 561, the court had under consideration a statute relative to locating ferries in or near cities or towns where the public convenience may require it. The court said that in this country there seems to be no precise legal definition of the term "town," and that it was used in the statute in its popular sense. In that case, the place claimed to be a town had a business house, dwelling houses for two families, and the population of the two families embraced six persons. The court said to call the place a town in any sense would be an obvious misapplication of the term. Again, in *Clements v. Crawford County Bank*, 64 Ark. 7, 40 S. W. 132, 62 Am. St. Rep. 149, the court had under consideration what constituted a town or village within the meaning of our Constitution relating to homesteads, and again approved the definition of the word as used in its popular sense in the first case cited. Hence it may be said that the word "town" as used in the statute is to be considered in its popular sense as an aggregation of houses so near one another that the inhabitants may fairly be said to dwell together. 38 Cyc. 596.

The word "city" in the United States denotes a large town, and is a municipal corporation charged with certain specified duties of government within its territorial limits. 11 C. J. 787; and *Ford v. Delta & Pine Land Co.* 164 U. S. 662, 41 L. ed. 590, 17 Sup. Ct. Rep. 230.

[2-4] We think that the framers of the statute in question used the words "city" and "town" in the popular sense as above stated, and only meant to place within the jurisdiction of the Arkansas Railroad Commission common carriers operating motor vehicles over a fixed route between cities and towns. The cities or towns are required to be the termini of the route. Stations might be established within, or reasonable distance without, the limits of said cities or towns for the purpose of receiving and
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discharging passengers or loading and unloading freight. Under the agreed statement of facts, none of the defendants came under the provisions of the act.

Haynes was operating a taxicab in the city of Hot Springs, and the mere fact that he went outside of the city on certain occasions to deliver passengers did not bring him within the provisions of the act in question.

The agreed statement of facts shows that Shick operated a sight-seeing bus, commencing its journey in the city of Hot Springs and going to Remmel Dam and certain springs near and returning to the city of Hot Springs. In making the sight-seeing trip, the bus did not go through any city or town. Consequently the operator did not come within the provisions of the statute.

Under the agreed statement of facts, Austeel operated a taxicab service from the hotels in the city of Hot Springs to the Hot Springs Country Club or golf course, which was about three miles from the city limits. In going to and from the city of the golf course, he did not go through any city or town. He only went to and from the hotels in the city to the golf course when passengers desired such service.

The defendants all complied with the ordinance of the city of Hot Springs regulating the operation of taxicabs, and we are of the opinion that, under the facts stated, the defendants were not operating motor vehicles as prescribed in the act, and that the circuit court properly held that the Arkansas Railroad Commission had no jurisdiction over them.

It follows that the judgment in each case will be affirmed.

CALIFORNIA RAILROAD COMMISSION.

VALLEJO ELECTRIC LIGHT & POWER COMPANY v. GREAT WESTERN POWER COMPANY OF CALIFORNIA.

[Decision No. 18861, Case No. 2371.]

Monopoly and competition — Electric utility — Territorial limits — Structures served as unit.

Where a structure or group of structures which might reasonably
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be considered as requiring one complete service such as a toll house which is a necessary adjunct to a bridge, are so located as to lie across a territorial boundary of two competitive utilities, the consumer should be permitted to take service from either side of such boundary line.

[September 30, 1927.]

COMPLAINT by one electric utility against another for alleged illegal territorial invasion; complaint dismissed.

Appearances: Devlin and Brookman, by Frank R. Devlin, for the complainant; Chaffee E. Hall, for the defendant.

Louttit, Commissioner: Vallejo Electric Light & Power Company, complainant, asks the Commission to make its order directing Great Western Power Company of California to cease and desist from rendering electric service to the toll house used in connection with the operation of Carquinez bridge owned and operated by the American Toll Bridge Company.

A hearing in this matter was held at San Francisco on August 18, 1927.

This Commission has heretofore established the territorial limits within which Vallejo Electric Light & Power Company may serve and has limited the extent to which Great Western Power Company of California may serve within said territorial limits. One of the boundaries of the territory of Vallejo Company is along the channel of Carquinez straits across which the Carquinez bridge has recently been built. It is of record that the Vallejo Company is alone authorized to serve in the immediate vicinity of the north abutment of Carquinez bridge, and that it is without authority to serve in the vicinity of the south abutment of said bridge. No question has been raised as to the right of Great Western Power Company to serve in the vicinity of the south abutment of Carquinez bridge, and for the purpose of this proceeding it may be assumed that Great Western Power Company has such right.

The toll house, service to which is under dispute in this proceeding, is located approximately 200 feet north of said north abutment, both toll house and Carquinez bridge being the property of American Toll Bridge Company.

Although service to the bridge proper is not made an issue in this proceeding, complainant's position is that defendant has no P.U.R.1928B.

right to render any service used on that portion of the bridge situate within the boundary line of the Vallejo Company. The boundary line need not here be defined, it being clearly evident that a portion of the bridge structure lies within the territorial limits established for the Vallejo Company, and outside of the area in which Great Western Power Company may serve.

It appears that American Toll Bridge Company owns its own circuit for distributing electric energy at both ends of and along said bridge, and that service might accordingly be taken with equal facility either from Great Western Power Company or from Vallejo Electric Light & Power Company. The bridge company has elected to deal with Great Western Power Company, receiving energy at a metering point located near the south abutment of the bridge. A portion of such energy so delivered after being transferred over the bridge company's own lines is used at the toll house. It is this service that Vallejo Electric Light & Power Company protests, although the bridge company's electric facilities lie wholly upon their own property.

As I see this matter the toll house is a necessary adjunct to the bridge, and electric service to the toll house and to the bridge proper may reasonably be considered as one complete service if the consumer so desires. Where a structure, or a group of structures which may reasonably be considered as requiring one complete service, are so located as to lie across a territorial boundary established by this Commission, the consumer should be permitted to take service from either side of such boundary line. The conditions to which this conclusion applies are to be carefully distinguished from an instance where the consumer might build his electric facilities over a boundary line established by the Commission to defeat the purpose for which such boundary was established.

Note.—Monopoly and competition.

- I. Possibility of lower rates, 657.*
- II. Inadequacy of existing service, 658.*
- III. Competition by transportation companies, 659.*
- IV. Restrictions and conditions, 660.*

I. Possibility of lower rates.

In Re Hall, Application No. 657, Decision No. 1449, Oct. 13, P.U.R.1928B.

1927, the only ground adduced by the applicant for a certificate to operate a motor carrier was that competition thereby afforded to existing utilities would benefit the public by lowering rates. The Colorado Commission, in refusing the certificate, stated: "Up to the present time the Commission has never issued a certificate authorizing a duplication of motor vehicle operation over a given route unless it appeared that the service already rendered was not adequate, that there was no ruinous competition or that the second applicant could, while operating on a sound business-like basis, afford transportation at cheaper rates than those already in effect. There has been no complaint to date as to the rates now being charged on the routes over which the applicant desires to serve. Moreover, the Commission stands ready at any time the unreasonableness of the rates of any carrier are questioned, to determine their reasonableness and to order them reduced if they are shown to be unreasonable."

The Minnesota Commission, in *Re Raymond*, A. T. C. Order No. 210, Jan. 12, 1928, in granting a certificate of convenience and necessity to operators of a motor carriage service in territory already served by an existing rail carrier was of the opinion that adequate service alone did not justify the refusal to authorize additional operators in the territory where there was indisputable evidence that the rail rates between points therein were discriminatory and that the free flow of trade to and from the community affected was hampered. The proposed rates of the carriers were considered only to the extent of relieving from such discrimination. The Commission stated: "This showing of public convenience and necessity by applicant based largely upon a more equitable rate cannot be overcome by the rail carrier's showing of a service admittedly adequate in schedules and equipment."

II. Inadequacy of existing service.

A boat company will not be granted a certificate to cover the operation of vessels on specified waters so as to authorize it to transport the employees and property of a lumber company between certain points, where the best common carrier service can be given by an existing company operating between the same points and serving all the public, there not being sufficient traffic for both companies. *Re Cousins Launch & Lighter Co. (Cal.)* Decision No. 17978, Application No. 13282, Feb. 8, 1927.

The Missouri Commission, in *Re Hatfield*, Case No. 5439, Jan. 5, 1928, in approving an application for a certificate of public convenience and necessity to operate as a motor carrier, over a route already served in part by an existing motor vehicle operator, found that it was not certain that the latter could take care of all the service over the route served and that the emergency equipment used by him, a P.U.R.1928B.

touring car, was not calculated to transport passengers in comfort and safety through the winter months and in inclement weather, whereas the applicant had ample facilities to take care of such transportation needs.

The South Dakota Board of Railroad Commissioners, in *Re Gray*, Order No. 1728-A, Dec. 12, 1927, approved the application for a certificate of convenience and necessity to operate as a carrier in the transportation of property between two points already served by a railroad carrier upon proof that the freight service was inadequate because of the loss of time in securing shipments and the number of handlings each shipment required, as well as the lack of refrigeration and heated car facilities. The express service, on the other hand, exacted rates which were materially higher than the freight rate and more than the proposed truck rate.

III. Competition by transportation companies.

In *Re Voza*, Application Nos. 907, 978, Decision No. 1546, Jan. 4, 1928, the Colorado Commission granted an application for a certificate to do a taxi business within the state, with the following qualifying remarks: "The Commission feels now, as it has in the past, that operators doing a taxi business should not be permitted to injuriously affect the regular operations over fixed routes which are necessary for the public convenience and necessity. It believes, therefore, that in those cases where certificates are authorized which permit operations to and between points where there is regular service, whether by motor carrier or rail, over fixed routes, the taxi rates should be made a part of the certificates. The Commission is further of the opinion that in cases like these only actual experience can determine whether or not the taxi operations are unduly interfering with regular operations, and that, therefore, jurisdiction over the application of Pete Govich should be retained in order in the future to make such other and further orders as the public convenience and necessity requires."

In *Re Duluth, S. S. & A. R. Co.* D-2250, Oct. 7, 1927, the Michigan Commission approved the suspension of reduced rates on hauling lumber in a certain territory where such reduction was made with the special purpose of attracting rapidly developing industrial patronage and to meet water competition thereby. The record showing that the prospective increase in patronage had failed to materialize, the Commission stated: "We believe that the controlling factor which was considered when the 20 cent rate was established was water competition. It has been the practice of carriers to meet water competition in many instances and such practice has been recognized as being justified where reasonable precaution and proper consideration is given so as not to place a burden upon other kinds of traffic. P.U.R.1928B.

The extent to which carriers meet water competition is a concession which this Commission cannot require of carriers."

A certificate of convenience and necessity to operate a motor utility over territory already adequately served by existing railroad carrier was refused by the Missouri Public Service Commission, in *Re Fulton-Mexico Bus Line*, Case No. 5365, Dec. 14, 1927.

In *Norfolk & W. R. Co. v. Public Utilities Commission*, No. 20288, — *Ohio St.* —, 158 N. E. 92, May 11, 1927, the supreme court of Ohio decided that the grant of a certificate of convenience and necessity to a motor utility by a State Commission was proper and justified where the protesting railroad by its own showing disclosed the fact that its route between points directly connected by the proposed motor route, was in the shape of two sides of a triangle, requiring change and connections of doubtful convenience enroute. The court also pointed out that the protesting carrier did not attempt to prove any substantial loss of patronage resulting from the proposed operations.

The Department of Public Works of Washington, in granting a certificate of convenience and necessity to a motor utility to operate over a field already served by an existing railroad, pointed out the advantages to public convenience that motor transportation would yield in the particular territory in question (which was a valley having numerous towns) since, under existing service any one arriving in any of the towns would have to remain over night, there being insufficient time between the arrival of the down train and the departure of the up valley train to allow for the transaction of any business. It was further pointed out that mail service was unsatisfactory going out after business hours and necessarily causing a delay of twenty-four hours on business letters. On the other hand the Department said that the proposed schedule would be just the opposite of the train schedule going up in the morning and down in the evening, and would supplement the service of the railroad in a satisfactory manner. The Department stated that motor service had certain advantages over the railroad, such as flexibility of schedules and the ability to stop in front of hotels and dwellings along the road whereas the railroad stations were often as much as a mile from the central parts of the town and even further from the roadside dwellings of farmers. *Re Washington Motor Coach Co. D-103, D-128*, Order No. 2176, Nov. 21, 1927.

IV. Restrictions and conditions.

The Pennsylvania Commission, in *Re Fishel*, Application Docket No. 17,600, Jan. 16, 1928, denied an application for a certificate of convenience and necessity for motor carriage operation where the testimony of the applicant to establish that existing railroad facilities

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were inadequate and inconvenient was based almost exclusively on the fact that the railroad company did not furnish door-to-door service. The proposed operations were to be unrestricted as to the kind or character of merchandise carried. The Commission said: "In the opinion of the Commission the granting of such rights and privileges would create a destructive and dangerous competitive condition which would not be to the best interests of the merchants and industries of Hanover."

In allowing bus substitution over an unprofitable route of a street railway company, the Utah Commission in *Re Utah Light & Traction Co.* Cases Nos. 979, 981, Oct. 15, 1927, refused to order the applicant to route its busses into the heart of the city, in order to avoid competition and loss of patronage on its other traction lines in that vicinity.

The Department of Public Works of Washington granted a motor utility a certificate of convenience and necessity to operate between two cities, with a limitation prohibiting the furnishing of any local service, in view of the operations of another motor utility already doing local business in that territory. The Department thought that the effect of such limitation would not take from the local company any business that it was receiving. The Department further stated: "Connected service by two independent operators is always unsatisfactory to the public. The operators usually have divergent interests. The inconvenience of transferring one's self and one's baggage from one car to another is oftentimes sufficient to divert patronage to some other transportation system." *Re Washington Motor Coach Co.* D-119, D-150, D-86, Order No. 2177, Nov. 21, 1927.

CALIFORNIA RAILROAD COMMISSION.

RE MARIN LUMBER & SUPPLY COMPANY.

[Decision No. 18944, Case No. 2386.]

Public utilities — Acts rendering private companies public utilities — Water.

1. A water system originally installed for the purpose of supplying water to a sawmill was declared to be a public utility where for forty years the water had been dedicated to public use and sold for compensation to all applicants for service within the service area of the system, p. 665.

Service — Duty to serve — Acquisition of water utility by foreclosure.

2. A company which, by means of a foreclosure sale, becomes possessed of a public utility water system must continue to render service P.U.R.1928B.

unless and until authorized to discontinue, since purported transfers of property devoted to public use are void when not authorized by the Commission, p. 669.

Public utilities — Change of status — Commission powers — Filing of rates.

3. A water system operated for forty years by an industry, the rates for which, however, were not filed with the Commission until recent years, was held to be so impressed with public utility obligations and liabilities from the beginning of the dedication of its water to public use that its status since the establishment of the Commission could not be terminated without the authority of the latter, p. 671.

Public utilities — Change of status — Refusal of compensation — Water utility.

4. The refusal of a water system, operated by an industry, to accept payment for utility service after taking such compensation for forty years from consumers which it served, does not change its status to that of a private company nor relieve it of its obligation to render public service, p. 671.

[October 25, 1927.]

INVESTIGATION on Commission's motion to inquire into the alleged refusal of water service to domestic patrons of a system operated by a lumber industry; service ordered to be re-established and improved.

Louttit, Commissioner: This is an investigation on the Commission's own motion to inquire into the reasons for the failure of Marin Lumber & Supply Company, a corporation, to continue to render proper and adequate water service from the water system owned by it and used for the purpose of supplying water to certain consumers in and in the vicinity of the town of Duncan's Mills, or Duncan Mills as it is also called, in Sonoma county, California.

In January of this year, informal complaints were made to this Commission to the effect that Marin Lumber & Supply Company, owner of the water system serving the town of Duncan's Mills, had allowed the system to become so run down and out of repair that it was practically impossible to obtain an adequate or continuous supply of water and that all requests made upon the company to make the necessary repairs had met with complete refusal. Upon taking this matter up informally with Marin Lumber & Supply Company, Philip R. Thayer, in capacity of president of said company, denied that the system
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was operated as a public utility and flatly refused to expend any time or money whatsoever in placing the system in a proper operating condition. All informal negotiations on the part of this Commission with the company having resulted in failure to obtain the improvement of conditions complained of, on the 13th day of July, 1927, the Commission, on its own motion, instituted an investigation into the affairs of Marin Lumber & Supply Company to determine the status of the water service heretofore rendered by it and its predecessors in interest and the reasons, if any, for the failure of said company to continue the service to the public and to determine by order the nature of the duties and the extent of the obligations of said company to continue its public utility obligations and liabilities in the furnishing of water to consumers in the town of Duncan's Mills.

A public hearing in this matter was held in Duncan's Mills on Tuesday, August 30, 1927, after all interested parties had been duly notified and given an opportunity to appear and be heard.

The record herein discloses that a copy of the Commission's order instituting this investigation and containing a notice of this hearing was served upon Marin Lumber & Supply Company, a corporation, at its offices, 215 Market street, San Francisco, California, by registered mail, and that acknowledgment of the receipt of such service on the part of Marin Lumber & Supply Company was made by Philip R. Thayer, president, in a letter to the Commission under date of August 19, 1927, which reads in part as follows:

The Marin Lumber & Supply Company is not operating a water system and has no intention of doing so. The company came into possession of certain lands in and near Duncan Mills, Sonoma county, by foreclosure of a mortgage. The company has taken over no public utility by purchase or otherwise. The water on its own property is for its own needs.

The writer will be unable to attend the hearing scheduled for August 30th, as he will be in the east at the time. The company will, therefore, have no representative at the hearing.

As forecast by the above letter, no one appeared at the hearing for or in behalf of Marin Lumber & Supply Company.
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From the documentary evidence, it appears that certain property in and about the present town of Duncan's Mills was acquired in the early seventies by Alexander Duncan and Samuel M. Duncan, Jr. Thereafter, on February 3, 1877, said Alexander Duncan, Samuel M. Duncan, Jr., and John F. Bixbee, together with certain other associates, formed and organized the Duncan's Mills Land & Lumber Company, a corporation, the articles of incorporation of which were filed in the office of the county clerk of the city and county of San Francisco, state of California, on the sixth day of February, 1877, and filed in the office of the secretary of state of the state of California on the 7th day of February, 1877. Duncan's Mills Land & Lumber Company applied for authority to change its corporate name to Marin Lumber & Supply Company, which was granted by a decree of the superior court of the state of California, city and county of San Francisco, endorsed and filed January 29, 1918. The corporate existence of Marin Lumber & Supply Company was extended for a period of fifty years from and after the 15th day of January, 1927, a certificate of the proceedings thereof having been filed on the 5th day of February, 1927, in the office of the county clerk of Sonoma county and filed in the office of the secretary of state of the state of California on the 3rd day of February, 1927.

According to the testimony, logging and milling operations had been conducted by, or on the property of, the Duncan's Mills Land & Lumber Company for a great many years and by various individuals, firms, or corporations until about four years ago, at which time the mill was burned. Since then no further logging or milling operations have been conducted on these properties. For a great many years, the mill was operated by the Duncan's Mills Land & Lumber Company; other interests acquired the properties by purchase, or by lease, or otherwise operated and were in control thereof at various times. On the 18th day of January, 1921, W. D. Mitchell and S. A. Mitchell by indenture recorded in the office of the county recorder of Sonoma county April 5, 1921, purchased these properties from Marin Lumber & Supply Company and the said Mitchells, together with other associates, formed a corporation under the laws of the state of P.U.R.1928B.

Delaware known as Mitchell & Virden Lumber Company for the purpose of continuing the logging and milling industries and otherwise developing the properties. The original and the amended articles of incorporation of this company were filed with the secretary of state of the state of Delaware on the 24th day of October and the 13th day of November, 1922, respectively, and were filed in the office of the secretary of state of the state of California on the 29th day of November, 1922.

It further appears from the record that in negotiating for the purchase of the mill and other properties of Marin Lumber & Supply Company, W. D. Mitchell, and S. A. Mitchell, on the 18th of January, 1921, mortgaged the said properties to Marin Lumber & Supply Company. Thereafter, said Marin Lumber & Supply Company regained ownership, control, and possession of the above properties by a foreclosure sale under, and by virtue of, judgment and a decree of the superior court of the county of Sonoma, entered October 1, 1925, and Commissioner's sale under date of November 16, 1926, and has been ever since and is now in control and possession of said properties.

[1] The evidence in this proceeding also establishes the fact that the water system involved in this proceeding was originally installed for the purpose of supplying the water necessary for the operation of the sawmill and other activities, together with the supplying of water for domestic and other purposes to employees of the mill and residents of the town of Duncan's Mills, and that water has been so supplied by this water system for a long period of years. The water for this system originally was and still is obtained from a small stream fed by a spring at a point about three miles north of Duncan's Mills and located on lands belonging to Marin Lumber & Supply Company. The water is diverted through a timber flume about 6 inches by 12 inches in section, and approximately one hundred feet in length, flowing into a wood-stave storage tank of about thirteen hundred gallons capacity. A transmission line, mainly 3½-inch casing, carries this water approximately three miles and delivers it into two tanks of about eighteen thousand gallons capacity each, situated at the northern edge of the town. From these latter two tanks distribution is made to about twenty-two consumers, P.U.R.1928B.

including the Northwestern Pacific Railroad Company, which uses the water for station and engine purposes. No definite information is available as to the exact date of the installation of the tanks and pipe lines. However, from the testimony, it is certain that practically all of the present equipment, including most of the pipe lines, has been in place for well over thirty years and a portion of the plant has undoubtedly been in service for a considerably greater period.

Marin Lumber & Supply Company supplies water to twelve consumers living in cottages which it owns, the water charges being included in the rent collected therefor. There are eight other consumers not occupying houses or buildings owned by the company but who for a great many years last past have been charged and have paid a monthly water rate to this company and/or its predecessors in interest up to and including the month of December, 1926. In addition to these, the Northwestern Pacific Railroad Company, formerly the North Pacific Coast Railroad, for many years has received and now receives water service for the use at its station and for two engine tanks, one located in Duncan's Mills and the other on the Cazadero branch line near Fraser. There are no private wells in the vicinity furnishing a potable water supply and no water system other than a private supply furnishing water to the properties of the Morrell Ranch situated adjacent to the town.

The evidence shows that since January, 1927, Marin Lumber & Supply Company has refused to accept payment for water service and has wholly failed to repair and maintain the pipe lines, storage tanks, and connecting facilities, with the result that since that time the water supply has been intermittent and interrupted for long periods of time and, in general, the supply has been wholly undependable. The refusal of Marin Lumber & Supply Company to make the required improvements has made it necessary for the various consumers to patch up the system themselves in order to maintain a sufficient supply of water for household and sanitary purposes. The testimony of E. S. Hall, appearing for and in behalf of the Northwestern Pacific Railroad Company, shows that this company has been compelled to send its own crew of men over this water system
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at various times during this year in order to obtain a sufficient supply of water for the use of the station and its employees living in the town of Duncan's Mills. The railroad company has also been forced to secure water for engine purposes at other points by reason of the fact that many times the water supply was insufficient for domestic requirements, thereby leaving no water available for engine use. The testimony further indicates that, although the entire system needs renewal and replacement, the tanks, intake, and pipe lines can be put in such condition as to render a reasonable service for at least two more years by the expenditure of a sum of money not in excess of \$300.

In view of the attitude of Marin Lumber & Supply Company that it is not now delivering or selling water to anyone as a public utility and that it has at no time ever engaged in such a business, it may be well to discuss in some detail the evidence presented by the record as to the sale and distribution of water by various owners and operators of this system.

For a great number of years, the Duncan's Mills Land & Lumber Company supplied water service to the Northwestern Pacific Railroad Company or its predecessor in interest, the North Pacific Coast Railroad Company, at Duncan's Mills for use in the station and for engine purposes. This service has been charged for at the rate of \$15 per month and payment has been made therefor and entered into the books by vouchers of the Northwestern Pacific Railroad Company. This service has been rendered continuously and without interruption throughout the succession of various ownerships and managements of the mill and other properties now belonging to Marin Lumber & Supply Company. General service to the community has been so delivered during the period in which the Mitchell & Virden Lumber Company operated the properties, during most of the time the said properties were owned or controlled by the Duncan's Mills Land & Lumber Company and, since regaining control and possession, Marin Lumber & Supply Company has also delivered water to the consumers for which it has accepted payment up to and including the month of December, 1926.

Mrs. M. (Modesta) DeCarley, who has been a resident of the town of Duncan's Mills for over forty years, testified that she
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owns property in the said town which was acquired from Alexander Duncan and Ann Jane Duncan, his wife, by her husband, J. B. DeCarley, now deceased, on the 8th day of August, 1896, and duly recorded August 15, 1896, in the office of the county recorder of Sonoma county, and was acquired by her upon the probate and distribution of the estate of her husband through a court decree of the superior court of Sonoma county, dated June 4, 1900; that this property has never at any time been owned or controlled by the Duncan's Mills Land & Lumber Company or any of its successors in interest; that she is now operating a general merchandise store on a part of said property and occupying a residence located on another part thereof; that for the past thirty years she has received water from the water system now owned by Marin Lumber & Supply Company and has been charged for such service and has paid for same up to and including the month of December, 1926. It furthermore appears that water service has been rendered to her property through and by means of this water system continuously during this period.

Victor Pedroia, a resident of Duncan's Mills for sixteen years last past, testified that he has been a customer of this water utility for the last fourteen years, receiving water for use at his residence, slaughterhouse, and livery stable during the entire period; that none of the property served belongs to Marin Lumber & Supply Company or any of its predecessors in interest, and, in so far as his knowledge goes, has never at any time been owned or controlled by it or any of its predecessors in interest. The rate charged for this service has been \$3.50 per month.

Mrs. W. F. Wiley's testimony shows that she has been a resident of Duncan's Mills for more than fourteen years; that she lives on property not owned or controlled by Marin Lumber & Supply Company and has received and paid for water furnished by this system to this property during the entire fourteen years.

The testimony of S. R. Hayden, a resident of Duncan's Mills for fifteen years last past, and also the testimony of Harry McLaren, a resident of the same town for well over thirty years, P.U.R.1928B.

is to the effect that water has been served by the Duncan's Mills Land & Lumber Company and its successors in interest without interruption to any and all applicants for such service and that it has always been customary and the practice of the operators of the said mill properties to make a charge and collect for the water supply from this system to those consumers not occupying houses owned by the company, firm, or individual then operating the properties; that water service has never been refused to anyone requesting the same, irrespective of whether or not such request came from a person living in a company house and working for the company or from a person living on private property and engaged in private enterprise.

The testimony of Joe Acquistapace, a resident of Duncan's Mills and a former employee for a great many years of the Duncan's Mills Land & Lumber Company and its successors in interest, is to the effect that within his own knowledge water has been supplied to the entire community from this system continuously for at least forty years.

[2] At the request of the Commission, rates charged for service rendered to consumers by means of this system were filed with the Commission on April 6, 1921. This occurred during the period the properties involved herein were operated by Mitchell & Virden Lumber Company and the rates were filed under the name of Duncan's Mills Water Company, signed by W. P. McFaul, manager. According to the evidence, said McFaul was associated with the Mitchell and Virden interests and the name given the water system was merely a fictitious name, apparently arbitrarily chosen to segregate the water operations from the other activities of the lumber company.

During the latter period of the régime of the Mitchell & Virden Lumber Company, Silvio DeCarley was appointed as its agent in looking after and operating the water system, collecting rents from the said company's houses and other of its properties, and collecting bills for water service. Since Marin Lumber & Supply Company regained control and possession of the mill and other properties under foreclosure proceedings referred to above, said DeCarley has remained in the capacity of collector of rents and water bills for the present owner, and, P.U.R.1928B.

although still receiving rents paid by tenants of the company's properties, has been notified by said company to collect no more bills for water service after bills rendered for the month of December, 1926. None of the moneys collected for water service and paid to Marin Lumber & Supply Company by DeCarley since said company regained control and possession of its properties have been returned to any of the consumers.

At no time during the operation of this water system have any of its owners, operators, agents, or representatives ever applied to this Commission or been granted authority to increase the rates charged for service or to encumber, sell, or transfer said water system or any part thereof, or to abandon or discontinue its public utility obligations and liabilities.

The evidence, both oral and documentary, presented in this case establishes to the satisfaction of this Commission that the owner of the water system supplying water to the consumers in and in the vicinity of Duncan's Mills is the Marin Lumber & Supply Company; that, except as to those portions of the pipe lines located on public highways, streets, or alleys, the entire intake, collection, storage, and distribution facilities are located upon lands belonging to said company; that for a period of at least forty years last past the waters of this system have been dedicated to the public use without interruption, except possibly as to fluctuation of flow or accident; that water has been sold for compensation to all applicants for service whether or not said applicants have been residing in houses owned by Marin Lumber & Supply Company or its predecessors in interest; that no water service has ever been refused to anyone residing in or in the vicinity of Duncan's Mills and within the service area of this system who has requested same; that the service has been rendered continuously throughout the above period up to and including the month of December, 1926; that the several purported transfers of the property thus devoted to public service were void because never authorized by this Commission; and that the defendant, as successor to the Duncan's Mills Land & Lumber Company, is now in possession of this system, and must continue to render this service unless and until authorized to discontinue the same by this Commission.

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[3, 4] There can be no other conclusion than that the waters of this system were originally dedicated to the public use by the Duncan's Mills Land & Lumber Company and that such dedication has continued unimpaired throughout a succession of various operators to and including the present owner, Marin Lumber & Supply Company.

Although the rates of this water system were not filed with this Commission until the 6th day of April, 1921, nevertheless, the public utility obligations and liabilities had impressed and attached themselves to this water system from the beginning of the dedication of the waters thereof to public use and were not at any time terminated in any legal manner by any of the successive owners or operators of this system, and, since the establishment of this Commission, could not have been so terminated without its authority, which has never been granted. It is, therefore, apparent that Marin Lumber & Supply Company has not properly fulfilled its duties and obligations to the public as an operator of a public utility water system by reason of its failure to maintain properly its water system and its failure to provide an adequate and sufficient water supply to its consumers. This corporation may not now arbitrarily discontinue the service to the public, and Marin Lumber & Supply Company will, therefore, be required to take immediate steps toward placing its water system in suitable operating condition, and will be required to render continuous and adequate service to all of its public utility consumers.

The evidence in this matter shows that this company has failed to maintain a proper structure to insure diversion of water from the stream into the intake flume; that said flume or trough used to transmit water from the stream into the collecting tank has rotted away to such an extent that it can not carry sufficient water to meet the system's demands; that the collecting tank and the two distribution storage tanks, together with their supporting structures, are in such a state of disrepair as to be incapable of proper functioning without immediate attention; that one of the storage tanks already has fallen down through lack of proper maintenance and that the transmission and distribution mains are badly rusted and leaking in many places.

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CALIFORNIA RAILROAD COMMISSION.

RE PACIFIC GAS AND ELECTRIC COMPANY.

[Decision No. 18977, Application No. 13745.]

Certificates of convenience and necessity — Prior illegal operation — Necessity for continued service.

A certificate for the operation of a gas utility should not be denied on the ground that a private company in taking over a gas system previously constructed and operated by a municipality has functioned without authority for an unavoidable interim between the change of management and the subsequent formal grant of Commission permission, because of the indispensable public need for the continuity of service.

[November 1, 1927.]

APPLICATION of a gas and electric utility for a certificate of convenience and necessity to exercise franchise rights in the distribution of gas; certificate granted.

Appearances: C. P. Cutten and R. W. Du Val, by R. W. Du Val, for applicant; L. H. Albertson, protestant.

By the **Commission**: This is the amended application of Pacific Gas & Electric Company asking the Commission to make it order granting applicant a certificate of public convenience and necessity to exercise the rights, privileges and franchise granted by the board of trustees of the city of Santa Clara.

A public hearing before examiner Gannon was held at Santa Clara, September 1, 1927, at which time testimony was introduced and the matter submitted for decision.

It appears that on or about December 27, 1926, applicant purchased the municipal gas distribution system of the city of Santa Clara, and has since been conducting a general retail gas service in that locality. Subsequent to said purchase the city of Santa Clara, by Ordinance No. 399, passed May 23, 1927, granted applicant a franchise to lay, maintain and/or use gas facilities within the city of Santa Clara. The franchise, which is for a term of fifty years, carries the usual provision for a tax of 2 per cent upon the gross revenue. A certified copy of the franchise is attached to the amended application, being marked Exhibit "A."

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L. H. Albertson protests, in effect, that applicant in operating a retail gas business within the city of Santa Clara, prior to the securing of a certificate of public convenience and necessity from this Commission, was violating the law, particularly in so far as such operation involved the laying of mains in city streets and similar exercise of functions ordinarily permitted only under franchise authority. Applicant admitted such operations had been carried on but urged that the practical necessity of such work must take precedence over technical legal matters.

Here we have the taking over of a gas distribution system heretofore legally constructed and operated by a municipality. During the necessary lapse of time prior to the securing of a franchise and authority from the Commission to exercise such franchise, the system must of necessity continue to function.

This Commission is here concerned with the matter of present and future necessity for the exercise of a franchise. Protestant has introduced no evidence to show that the withholding of a certificate of public convenience and necessity would be in the public interest. On the other hand, the evidence indicates that applicant is the only party rendering a gas service within the city of Santa Clara; that such service is rendered at rates prevailing in neighboring territory; that such service can be rendered without detriment to applicant's other consumers; and that public convenience and necessity reasonably require that applicant should exercise the rights and privileges under the franchise mentioned above.

Applicant has filed with the Commission a stipulation, duly and legally authorized by its board of directors, to the effect that applicant, its successors or assigns, will never claim before the Railroad Commission or any court or other public body any value for the aforesaid franchise in excess of the amount actually paid to the city of Santa Clara for said franchise, which amount is \$100.

ORDER.

Pacific Gas & Electric Company having applied to the Railroad Commission of the state of California for a certificate of public convenience and necessity for the exercise of certain rights
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and privileges granted by the city of Santa Clara in Ordinance No. 399, a public hearing having been held, the matter having been submitted and being now ready for decision:

The Railroad Commission of the state of California hereby certifies and declares that public convenience and necessity require and will require the exercise by Pacific Gas & Electric Company of those rights and privileges granted by Ordinance No. 399, adopted by the board of trustees of the city of Santa Clara on May 23, 1927.

The authority herein granted shall be effective from and after the date of this order.

For all other purposes the effective date of this order shall be twenty days from and after the date hereof.

Note.—Certificates of convenience and necessity.

- I. Operation in good faith prior to regulation, 674.*
- II. Consent of other governmental bodies, 675.*
- III. Reasons for granting or refusing:*
 - a. In general, 676.*
 - b. Character of applicant, 677.*
- IV. Evidence of necessity, 677.*
- V. Preference between applicants, 677.*
- VI. Conditions and restrictions, 678.*
- VII. Scope:*
 - a. In general, 678.*
 - b. Irregular operation, 679.*
- VIII. Assignment and sale, 680.*
- IX. Procedure, 680.*

I. Operation in good faith prior to regulation.

The Public Service Commission of Missouri, in *Re McDavid-Silvers Coach Co.* Case No. 5385, Dec. 30, 1927, and *Re Steele*, Case No. 5456, Dec. 29, 1927, approved applications for a certificate of convenience and necessity where it appeared that the applicants had been operating in good faith rendering satisfactory and dependable service over the proposed routes for a period of one year, and that they were rendering such service prior to the regulation of motor vehicles in the state of Missouri, complying with all rules and regulations of the Public Service Commission in such cases.

The Missouri Public Service Commission, in *Re Purple Swan Safety Coach Lines*, Case No. 5373, Dec. 2, 1927, was of the opinion that the applicant for a certificate of convenience and necessity to operate a motor passenger service between cities and intermediate P.U.R.1928B.

points was actually operating in good faith and rendering satisfactory and dependable service on and prior to December 1, 1926, and that the applicant had complied with the law and rules and regulations of the Commission and a certificate was accordingly granted as provided by law in such cases.

The Missouri Commission, in *Re Scofield Bus Lines*, Case No. 5382, Dec. 9, 1927; *Re Akin Bus Line*, Case No. 5440, Dec. 16, 1927; *Re Bitzer*, Case No. 5416, Dec. 16, 1927; *Re Mitchell*, Case No. 5444, Dec. 15, 1927; *Re T-C Bus Co.* Case No. 5477, Dec. 12, 1927; *Re Combs*, Case No. 5375, Dec. 10, 1927, granted certificates of convenience and necessity for operation over routes within the state by motor busses upon proof that the applicants were in good faith rendering satisfactory and dependable service on and prior to enforcement of the regulatory act, within the meaning and intent of the Motor Bus Law (1927, § 2) providing exemption from proof by applicants of convenience and necessity in such cases.

The Public Service Commission of Missouri, in *Re Williams*, Case No. 5484, Jan. 16, 1928, approved an application to operate as a motor carrier within the state upon a showing that although the applicant had owned the line at the hearing only thirty days, said line had been established for a period of nine years and it had a regular schedule of one trip per day which had been maintained by all of the owners of the bus line since its operation had been commenced, and further that the applicant had taken over the lines from an operator who had been in the business for a period of five years, operating in good faith prior to regulation.

The Wisconsin Commission approved an application in *Re Peotter*, No. 34A, Dec. 30, 1927, for an amendment to a certificate authorizing operation as an auto transportation company where the route had actually been operated by the applicant for some two years prior to the effective date of the regulatory legislation, but owing to misunderstanding as to the legal requirements with reference to the specification of routes in applications for certificates, the operations were not actually authorized on the effective date. Thereafter, upon notice by the Commission, the applicant had ceased to operate the routes involved at the time of the hearing. The approval was made in view of the fact that the city had consented to the extension desired and that the additional service was in conformity with public convenience.

II. Consent of other governmental bodies.

In *Re Bitzer*, Case No. 5416, Dec. 16, 1927, the Missouri Commission made the following statement with regard to the objection of a city to the authority of the Commission to grant a certificate to a carrier to operate over its streets: "Relative to the protest of P.U.R.1928B.

the city of Warrensburg, the Commission maintains the same position that it has maintained in all other cases of this character. The Commission will not attempt to dictate the route over which applicant's bus line shall operate in the city of Warrensburg. The certificate of convenience and necessity granted the applicant by the Commission authorizes it to operate between fixed termini, but the city will determine the particular streets over which the applicant shall pass."

The Commission has no authority to issue a certificate of convenience and necessity for the construction of an electric distribution system in a village when the applicant has not secured the necessary consent of the municipal authorities. *Re Empire Dist. Electric Co. (Mo.)* Cases Nos. 5110, 5122, 5146, 5164, May 3, 1927.

III. Reasons for granting or refusing.

a. In general.

In *Re Fort Morgan-Brush Transp. Co.* Application No. 833 $\frac{1}{2}$, Decision No. 1519, Dec. 6, 1927, the Public Utilities Commission of Colorado, denying a certificate of convenience and necessity to a motor utility, found that while the service of the applicant offered certain conveniences, such as a slight saving due to the elimination of drayage charges in the hauling of merchandise, the showing made did not sufficiently disclose a need for motor truck transportation by the people of the communities involved, but that the latter seemed to consider the service of the railroad and express company indispensable, and feared that the issuance of a certificate for the operation of a motor vehicle system would result in an impairment or reduction of railroad service. The Commission was of the further opinion that public necessity was a need without which the public would be inconvenienced to the extent of being handicapped in the pursuit of business, and that the facts in the particular case did not show a need.

The Illinois Commerce Commission, in denying the application in *Re Central Steam Heat & Power Co.* No. 17612, Nov. 23, 1927, for a certificate of convenience and necessity to construct, operate, and maintain a central steam heating system in a city of that state, made the following statement: "The Commission has jurisdiction over a considerable number of public utilities engaged in rendering the kind of service proposed by this petitioner under its application herein, and is in position to take note of the fact that heating utilities, under conditions such as prevail in the territory here proposed to be served, are very difficult to operate with commercial success. It is proper, therefore, that where an application, such as the one under consideration, is made, clear proof should be required as to the commercial feasibility of the project and as to the ability of the P.U.R.1928B.

petitioner to construct the necessary facilities and successfully operate them, to the end that the public may be protected against the inconveniences and financial losses that inevitably attend failure or noncompletion of a project once construction work has begun or investments made."

b. Character of applicant.

In *Re Vozza*, Application Nos. 907, 978, Decision No. 1546, Jan. 4, 1928, the Colorado Commission refused an application for a certificate to a motor operator where there was some question about the ownership of the equipment; some testimony being to the effect that it stood in the name of his mother-in-law. The Commission had requested the counsel to obtain a statement from the applicant and from his mother-in-law stating that he and not she was the owner of such equipment, but no answer to this inquiry was received. The Commission was of the opinion that his financial dependability was, therefore, very doubtful and that he did not possess the necessary personal qualifications to conduct a public service business.

The South Dakota Commission, in *Re Phelps*, Order No. 558-B, Jan. 21, 1928, approved an application for authority to operate as a class B motor carrier of property in a vicinity where three carriers were already operating, upon a showing that a fourth carrier previously authorized had discontinued service and that the farmers in the territory needed the additional service which could be furnished by the applicant.

IV. Evidence of necessity.

The Indiana Commission, in *Re Algiers, Winslow & W. R. Co.* Docket Nos. 6518, 9162, Jan. 6, 1928, approved an application to construct, equip, and operate a railroad of a length of 15 miles in the state of Indiana upon a showing that a coal company, the principal industry depended upon to supply the business for the proposed railroad, had been refused a request for the establishment of $4\frac{1}{2}$ miles of side track into its fields by existing railroad carriers, and upon further evidence that existing railroads in the territory would not be inconvenienced and would not object to the construction, which would accommodate a small amount of freight shipments to and from the communities through which it would operate.

V. Preference between applicants.

Authority to extend electric service to a village should be granted to a company holding a franchise and favored by the inhabitants, notwithstanding objections by another company which possesses a certificate authorizing the construction of a transmission line into the territory but which has not secured a franchise or taken steps P.U.R.1928B.

toward furnishing service. *Re Empire Dist. Electric Co. (Mo.)* Cases Nos. 5110, 5122, 5146, 5164, May 3, 1927.

VI. Conditions and restrictions.

The Missouri Commission, in *Re Basham*, Case No. 5457, January 9, 1928, in approving an application for a certificate of convenience and necessity found that considerable rivalry and competition had developed between the applicant and another motor bus operator over the same route in view of the fact that the Commission had required the other operator to leave forty-five minutes after the applicant. The Commission thereupon required the applicant to change its schedule to avert such competition, stating: "Competition and rivalry between motor bus operators should never go to the extent of racing and speeding to the hazard or discomfort of its passengers, and in order to avoid that condition, the Commission is requiring the change in schedule. If it appears, in the future, that other changes of schedule should be made, orders to that effect will be issued by the Commission."

In *Re King*, Case No. 5388, Dec. 15, 1927, the Missouri Commission found that the applicants were rendering satisfactory and dependable service in good faith on and prior to December 1, 1926, within the meaning and intent of the Motor Bus Law (1927, § 11) and entitled to the presumption of convenience and necessity. The Commission required, however, that the applicants refrain from starting their busses at a morning hour simultaneously with the departure of busses of a rival applicant also operating in good faith prior to regulation, and that a schedule of arrivals and departures be filed that would eliminate duplication of service.

The Pennsylvania Commission, in *Suburban Cab Co. v. Richmond*, Complaint Docket No. 7438, Dec. 6, 1927, upon a complaint of a holder of a certificate authorizing the complainant to park its taxicabs in front of a trolley station, ordered the respondent taxicab operator to forfeit and pay to the Commonwealth the sum of \$50 for violation of a previous order of the Commission, upon the complaint of the same party, prohibiting him from leaving his legal parking stand nearby and parking upon the spaces reserved for the complainant, thereby interfering with the complainant's business and its access to the station.

VII. Scope.

a. In general.

The Pennsylvania Commission, in *East Penn Electric Co. v. Kline*, Complaint Docket No. 7312, Dec. 6, 1927, ordered a holder of a certificate of convenience and necessity authorizing the operation of busses between specified points to cease from hiring out a bus not P.U.R.1928B.

used in connection with his regular business, nor covered by a certificate, to group and party service without a certificate for such operation. The respondent contended that such operation was not common carriage, and that the starting time, route, destination, number, or identity of passengers was beyond respondent's control. The Commission pointed out that the vehicle had no real use other than the carriage of indiscriminate groups and parties of persons,—a regular rather than an incidental use, and was not a mere occasional one. An order was issued forbidding such further operation without a certificate.

b. Irregular operation.

The Colorado Public Utilities Commission, in *Re Maxday*, Application Nos. 938, 944, Decision No. 1521, Dec. 12, 1927, approved the granting of certificates of convenience and necessity to two motor vehicle operators doing a taxi business in two counties of that state. In commenting upon the scope of the certificate so issued the Commission stated: "The applicants both insist that there are now and then cases of emergency in which it is necessary for them to transport passengers to points outside of the two counties named. We believe that if the applicants are to have what is generally termed a roving certificate, there should be some very substantial limitations thereon as it is difficult to find the public convenience and necessity requires authority to do such a business except in very rare cases. We believe that the rates on trips outside of the two counties named should in no case be less than $12\frac{1}{2}$ cents per mile for each passenger. In other words, the rate in these cases where there are more than two passengers will be the same per passenger as in the cases where there are one or two passengers."

The Missouri Commission held that its authority extended only to the granting of a certificate of convenience and necessity to operate over regular routes and between fixed termini and that it could not authorize an applicant to engage in irregular operations. *Re Harvey*, Case No. 5443, Dec. 20, 1927.

The Missouri Commission, in *Re Interstate Stage Lines Co.* Case No. 5404, Jan. 28, 1928, stated, in refusing permission to a motor utility to operate as a contract carrier to any point within the state: "The testimony shows that the applicant would expect to operate over routes for which the Commission has issued certificates of conveniences and necessity to regular carriers. The Commission has, heretofore, refused to give blanket authority for such operation because it was of the opinion that it was both outside of its authority under the law, and that it would work an unnecessary hardship and injustice upon those carriers regularly serving the route."

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VIII. Assignment and sale.

The Colorado Commission, in *Re Sandoval*, Application No. 9794, Decision No. 1512, Nov. 25, 1927, approved the application of a holder of a certificate of convenience and necessity to operate a motor utility, to transfer the same to another holder of a similar certificate over the same route. The evidence showed that there was not enough business on the route in question to warrant the operation of the two systems and that the purchaser was financially responsible and quite dependable as an operator.

The Wisconsin Railroad Commission, in *Re Inter-County Motor Coach Line*, No. 37A, Dec. 28, 1927, approved an application for a certificate to operate motor vehicles over a proposed route which had in fact been operated by a co-partnership prior to the effective date of the regulatory act. Since that time, however, one of the partners had absorbed the interest of the other and for business reasons had incorporated the line. In view of the fact that under the new Bus Law certificates were not transferable, it became necessary for the line to apply for a new certificate upon proof of convenience and necessity, which was done.

IX. Procedure.

The Railroad Commission of Wisconsin, in *Re Southern Wisconsin Transp. Co.* No. 43A, Dec. 30, 1927, approved an application for a certificate to operate a motor vehicle between certain points within a state upon a showing that an individual who was president of the applicant corporation was entitled by law pursuant to Chapter 395, Laws of 1927, to a certificate covering the route and substantially the service proposed by the applicant, and that he agreed that if such a certificate were granted to an applicant, he would withdraw the application which he had made for a similar certificate. The Commission incidentally decided that public convenience and necessity required the service upon its own merit.

The Missouri Commission, in *Re Mitchell*, Case No. 5444, Dec. 15, 1927, waived the requirement of filing of a liability insurance policy as a prerequisite to the obtaining of a certificate at the request of the applicant upon a clear showing that he was in a sufficiently sound financial condition through personal realty holdings to satisfy the indemnity requirements of the law.
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COLORADO PUBLIC UTILITIES COMMISSION.**RE AMENDMENT TO RULES REGULATING SERVICE
OF GAS, ELECTRIC, AND WATER UTILITIES.**

[Case No. 234, Decision No. 1515.]

Service — Meters — Ownership by consumers — Considerations.

1. It was considered impracticable to enforce the provisions of a rule requiring water utilities to own and maintain all meters and incident connections in view of the burden of increased capitalization necessary to absorb the expense of acquiring such property, the fact that a meter is often special in its application, being valueless to the utility in case of service abandonment, and the fact that consumers take better care of their own property, p. 682.

Valuation — Meters owned by consumers.

2. A rule requiring utilities to own and maintain meters and incident connections was permanently suspended with the express restriction that such equipment owned by consumers should not be valued as useful utility property in any valuation for rate-making purposes, p. 683.

[December 5, 1927.]

INVESTIGATION by Commission on its own motion as to the necessity of adopting a proposed rule requiring water utilities to own all meters and incident connections; proposals dismissed without prejudice.

By the **Commission**: On March 26, 1921, the Commission on its own motion served a notice on all water utilities and others concerned in the state of Colorado of a hearing to be held at its Hearing Room, Denver, Colorado, April 15, 1921, to consider the adoption of what was designated as Rule 47-A of Rules Regulating Gas, Electric, and Water Utilities. This rule proposed,

“That where metered service is required on all new connections made on and after May 15, 1921, the meter shall be owned and maintained by the utility.

That on and after May 15, 1921, consumers shall not be required, through deposits or otherwise, to share in the cost of meters. That not later than January 1, 1922, all water meters shall be owned and maintained by the utility.

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That not later than January 1, 1922, all deposits theretofore made shall be refunded to consumers."

In pursuance of this notice, the matter duly came on for hearing before the Commissioners *en banc* at the time and place designated.

[1] About thirty-five utilities were represented, and after considerable discussion it was disclosed that there was much diversity of opinion respecting the matter, and the hearing was concluded with the understanding that the Commission would seek further information regarding the matter before taking any further action. Therefore, to this end a circular letter was addressed to all water utilities of the state requesting their opinion as to the adoption of a general rule (1) with reference to the ownership by the utility, municipally or privately owned, either or both, of water meters as being a part of the plant or facility, and if so to briefly indicate what rule should be, and (2) if no such general rule should be adopted, why?

Replies to this letter were received from a large number of the water utilities of the state and there was almost unanimous opposition to any rule requiring the utility to own or be at the expense of installation of the water meters. Reasons advanced for this opposition were many and various, the principal of which were the following:

1. It would create such a burden on the utility that it would be necessary to increase the water rates to take care of the increase in capitalization of the plant necessary to absorb cost of the meters. In the case of municipally owned plants it would be necessary to further increase the bonded indebtedness to acquire the meters and this would only add increased taxation to take care of the bonds.

2. The meter equipment is often special in its application and has no particular value to the utility in case the service is abandoned, as for example in the case of large meters for some particular plants.

3. If the consumer owns the meter, he will be more interested in protecting and caring for the meter than if it belonged to the utility.

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After carefully considering these replies to this circular letter heretofore referred to, and all the records in the case, the Commission is convinced that it would be impracticable to enforce the provisions of Rule 14 as it affects water meters at this time.

[2] From the records it is learned that the primary purpose for the adoption of the proposed Rule 47-A was to correct an error that was inadvertently made by the suspension of Rule 14 in the order of this Commission on March 22, 1917, in Case No. 84. This case came before the Commission to determine "whether or not the consumer of the service of the water utility shall bear the expense of the installation of the *service connection* from the utility's main to the curb line, and whether the utility or the consumer should *maintain all service connections* now or hereafter installed." The provisions of Rule 14 in paragraphs (b), (c), (d) and "note" covers the matter of service connections, and the order was intended to cover these paragraphs of Rule 14. But the order suspended Rule 14 entirely, including paragraph (a) which refers to meters alone. Therefore, this proposed Rule 47-A was to correct that error.

The Commission is now of the opinion that all of the provisions of Rule 14, including that for the meters, should remain indefinitely suspended. This conclusion is made with the provision that in consideration of any rate case it must be distinctly understood that where the service connections and meters, one or both are paid for by the consumer, the value of same shall not enter into the capitalization of the utility as a basis for the rate structure. The same rule will apply in the maintenance expense of the utility in rate cases when the consumer is required to maintain the service connections or meters. The utility can only expect a fair return from its rates on the value of the actual parts of the plant it owns. Clearly if the service connections, meters, etc., are installed at the expense of the consumer these parts belong to the consumer and are the consumer's property to be disposed of or used for such purposes as may be desired by the consumer. In no sense do they belong to the utility or can be retained when no longer used by the consumer without due recompense or consent of the consumer.

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In conformity with the above provisions the Commission will have the right in any rate case that may come before it to require the expense of installation and maintenance of service connections and meters to be borne by the utility where the circumstances justify it.

Therefore, in accordance with the foregoing understanding the provisions of paragraph (a) in Rule 14 are now to be fully understood as included in the order suspending Rule 14 of the Commission's rules regulating gas, electric, and water service in so far as the same applies to water utilities as made in Case No. 84. This order provides:

"That Rule 14 of the Commission's rules pertaining to the regulation of gas, electric, and water service of all privately owned or municipally owned gas, electric and water utilities operating within the state of Colorado, in so far as the same applies to privately owned and municipally owned and operated water utilities, shall be indefinitely suspended, and, therefore, shall not become effective on the 1st of April, 1917."

The Commission now being fully advised, and with its understanding of the matter as herein stated, as a part of the order, will now make and enter its order as follows: [Order omitted.]

Note.—Service.

- I. Jurisdiction, powers, and duties of Commissions, 685.**
- II. Duty to serve:**
 - a. Pending sale, 685.**
 - b. Substitution of service:**
 - 1. Bus for rail service, 685.**
 - 2. Railroad station agents, 686.**
 - c. Extensions, 688.**
 - d. Abandonment and discontinuance:**
 - 1. In general, 689.**
 - 2. Inadequate return, 690.**
 - 3. Improper actions of patrons, 691.**
- III. Service by particular utilities:**
 - a. Automobile, 691.**
 - b. Railroad, 691.**
 - c. Street railway, 692.**
 - d. Telephone:**
 - 1. In general, 693.**
 - 2. Directory listings, 693.**

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III.—continued.

3. Exchange areas, 694.

c. Water, 695.

1. Jurisdiction, powers, and duties of Commissions.

The Commission has no power to require a railroad to construct a siding across property not owned by it to serve a shipper although such a siding formerly existed under agreement with the property owner. *Goldman v. Easton & N. R. Co. (Pa.)* Complaint Docket No. 7199, May 3, 1927.

A contract between an unincorporated association and a power company entered into for the purpose of securing electricity in a community is not required to be filed with the Commission. *Otto v. Wisconsin Pub. Service Corp. (Wis.)* U-3406, Feb. 12, 1927.

II. Duty to serve.

a. Pending sale.

The Illinois Commerce Commission, on its own motion, against the Mt. Olive Telephone & Electric Company, in regard to violation of General Order 107 and failure to answer correspondence directed to the utility, as a result of service inspection, found that the utility system was in a very poor state of repair. The company responded that its property was for sale and an option had already been given to be terminated shortly. The Commission ordered immediate reconstruction or plans for effecting the same and subsequent reports as to the condition of the system to be submitted within sixty, ninety, and one hundred and twenty days, during which time the reconstruction work was to be completed. *Illinois Commerce Commission v. Mt. Olive Teleph. & Electric Co. No. 17772*, Dec. 21, 1927.

b. Substitution of service.

1. Bus for rail service.

A railroad company was authorized to discontinue passenger trains operating with an increasing loss and to substitute motor busses until the efficacy of the service was fully tried out, upon condition that the freight service would not be curtailed, that trains would be operated when the weather interfered with motor bus operation, and that the trains would be restored if the bus operation should be discontinued for any reason or if the bus operation were found at any time to be inadequate. *Re Denver & R. G. W. R. Co. (Colo.)* Decision No. 1205, March 31, 1927; April 1, 1927.

The Illinois Commerce Commission, in *Re Cleveland, C. C. & St. L. R. Co. No. 15,881*, Nov. 16, 1927, granted permission to the petitioner to discontinue four passenger trains because of inadequate P.U.R.1928B.

revenue obtained from such service. The Commission had previously approved of such discontinuance with the understanding that bus service would be substituted, but before the order of such hearing had been made final the petitioner was unable to procure the proposed bus service for the reason that the business which would accrue to such service by discontinuance of said trains would not produce an adequate revenue to justify the substitution. A petition was thereupon filed asking for the discontinuance of such trains without the substitution of bus service. The evidence at the subsequent hearing showed that six trains were being operated at a loss, due mostly to competition by motor transportation, and that public convenience no longer required the operation of five of these trains as it did not appear from the evidence that the loss could be so serious as to forbid the continued operation of one unprofitable train to meet the public convenience and necessity, which was conceded by the petitioner.

The Illinois Commerce Commission, in *Re Cleveland, C. C. & St. L. R. Co. No. 16200*, Dec. 21, 1927, approved an application for authority to discontinue the operation of certain passenger trains giving local service between various points in the state upon evidence of heavy losses sustained by the operation of such trains. The Commission pointed out that an application was on file by one company which had already demonstrated its ability to take care of such territory and that public convenience and necessity would thus be satisfied without requiring the petitioner to continue the operation of trains at severe loss of revenue.

Passenger trains operated at a loss may be discontinued and motor busses substituted, where no material inconvenience will result from the substituted service which will effect a considerable saving in operating expenses. *Re Central R. Co. (N. J.)* April 14, 1927.

2. Railroad station agents.

In *Re Gray's Point Terminal R. Co. Case 5380*, Dec. 8, 1927, the Missouri Commission refused the petition of the terminal and railroad company to substitute a ticket agent caretaker for an agent-telegrapher at a minor station on its system for the purpose of handling the freight business in and out of the station a few miles up the track, upon a showing that the revenue obtained therefrom was adequate and that considerable inconvenience would result to the residents in the vicinity of a small village and to an industry in another village near the station sought to be discontinued. The Commission was, however, disposed to grant the applicant, if it so desired, permission to substitute an agent for an agent-telegrapher at the station.

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The Missouri Commission, in *Guthrie v. Chicago & A. R. Co.* Case No. 5455, Dec. 15, 1927, approved the complaint of the village against discontinuance of agency service at a station. The testimony in the case said that the principal part of the business consisted of shipments of live stock, which must be shipped promptly in order to avoid danger of great loss. The evidence in the case did not indicate that the defendant was operating the station at a loss at and prior to the time it dispensed with the agent, and the Commission was of the opinion that it would not sustain a loss by maintaining an agent, in view of the large shipments of live stock at the station. The method used in determining the profitability of the station was referred to as follows: "One method adopted by railroad companies to determine the amount of revenue produced by its operations at a station, is to credit the station with one-half of the revenue received from shipments of freight and all revenue received from the sale of passenger tickets."

The Nebraska Railroad Commission, in *Re Missouri P. R. Co.* Application No. 7029, Dec. 8, 1927, in granting an application of a railroad for authority to discontinue agency service, disapproved of the closing of the station in view of the fact that out going and in coming shipments, express and freight would have to be left at the station at the mercy of any passing dishonest person, causing public inconvenience as well as trouble to the railroad. The Commission ordered that a custodian service be substituted to keep the depot open, heated, and lighted for the convenience of the people.

The New Jersey Board of Public Utility Commissioners, in *Re Union Transp. Co.* Dec. 1, 1927, granted the application of a railroad to discontinue agency service at a station which had been operating at a deficit for some time, and revenues from which were steadily decreasing. Commenting on the situation, the Board said: "The decrease in volume of traffic handled results from the use of automobile trucks by shippers and receivers of freight, making it necessary to reduce operating expenses wherever possible in order to maintain the railroad. From the testimony it would appear that no material inconvenience will result from the abandonment of the station agencies as the stations will be kept open and maintained for the use of the company's patrons. A company telephone is located in the stations which can be used by shippers when ordering empty cars or transacting business with the company's agents at New Egypt, Imlaystown, or Pemberton. With these facilities for transacting business there would appear no substantial reason for continuing the agencies."

The Pennsylvania Commission, in *Re Lehigh Valley R. Co.* Application Docket No. 17,697, Jan. 16, 1928, disapproved an application P.U.R.1928B.

tion of a railroad to change a station along its route from agency to prepaid service. The Commission reiterated a prior holding on the same basis that where business transaction is sufficient to take care of the cost of service and the continuance of such service will not place an additional burden upon the other traffic of the company, the Commission is not justified in permitting the discontinuance of an agent particularly where the application is protested. The Commission stated: "The Commission recognizes that the necessity of an agency station is not determined solely upon the cost of maintaining the agent as compared with the revenue derived at the station. There may be other conditions and circumstances that might have a deciding and important bearing on the question. In the present application no such conditions or circumstances were presented. The applicant has failed to establish such state of facts as would justify an order approving the application."

The Pennsylvania Commission, in *Re Reading Co. Application* Docket No. 17,803, Jan. 16, 1928, denied an application of a railroad for approval of a change of a station along its route from agency to nonagency service where the evidence conclusively showed that the revenue derived from the station was about two and one-half times the expense of maintaining the same.

c. Extensions.

The Pennsylvania Commission, in *Chopick v. Spring Brook Water Supply Co.* Complaint Docket No. 7130, Dec. 6, 1927, refused the complaint of about 14 families living in an isolated section adjoining the territory served by the respondent water company for the extension of service upon a showing that the cost of said extension would be not less than \$8000, and the total anticipated revenue would not exceed \$112, and upon a further proof that the premises were not upon a public highway, that the property of nine of the complainants abutted the right of way of a railroad company, and that the houses of two of the complainants were in the road of a proposed extension of highway.

A contract between a power company and a voluntary association providing for "a pole line system for the distribution of electric light and power, to all residences and places of business therein [in a village], desiring said service, no extension to be over 250 feet from existing line," does not entitle an applicant who is not member of the association to demand service under the contract on the ground that the obligation was to extend the original construction to all places in the village for which service was desired; but service may be required on the terms and conditions incorporated in the rates and rules lawfully established and on file with the Commission. P.U.R.1928B.

Otto v. Wisconsin Pub. Service Corp. (Wis.) U-3406, Feb. 12, 1927.

A voluntary association which has secured an electric extension to a community under contract should not after an ample development period of six years be permitted to make connection charges for new consumers, but connections should be made by the power company in accordance with its own rates, rules, and regulations on file with the Commission. *Ibid.*

d. Abandonment and discontinuance.

1. In general.

In *Re Satero*, Application No. 1003, Decision No. 1536, Jan. 3, 1928, a railroad protested an application of a motor utility to abandon a portion of its route, taking the position that as the whole route was covered by one certificate the Commission did not have the power or jurisdiction to consider abandonment of the operation over a portion only of said route, and inasmuch as the applicant was reopening the question of public convenience and necessity, the railroad desired the Commission to reopen the whole case and determine whether the public convenience and necessity required any of the operation whatsoever. The Colorado Commission was of the opinion that it had authority to authorize the abandonment of operation over a portion of a route covered by the original certificate which was accordingly granted.

In *Re Northern P. R. Co.* A-4075, Nov. 4, 1927, several trains sought to be discontinued were rendering service of a mixed character, changing from freight to passenger service at different points along the route. For this reason the Minnesota Commission held that such changes would be considered part of the passenger service in so far as this specific application was concerned and the entire matter treated as an application to remove passenger train service under the provisions of an act (§ 4718, G. S. 1923) providing that no such discontinuance of passenger train carriers should be made without permission from the Commission.

In *Re Raymond*, A. T. C. Order No. 210, Jan. 12, 1928, a petition by an operator formerly authorized to give motor service in the territory proposed by an applicant for a certificate in that case, was presented, asking that he, the petitioner, be permitted to abandon and discontinue service "expressly conditioned upon the granting by said Commission of a certificate of convenience and necessity" to the applicant and in event of a denial or dismissal of such application that his petition be withdrawn and considered null and void. The Minnesota Commission held that it was not bound by any restrictions or conditions attempted to be placed upon their consideration P.U.R.1928B.

of a petition to discontinue by the petitioner. The Commission stated: "His proposal is this: if we determine the application favorably he will discontinue, but if we deny the application he will continue. The attitude that this operator takes does not meet with the approval of the Commission. In truth, the petition undoubtedly means that this operator does not intend to comply with the order of the Commission directing that a certificate be issued to him, and seeks to abandon and discontinue the service he proposed in his application. The Commission can consider it only as an unqualified request. To consider it otherwise would be showing a slight regard for the law—by so considering it we also avoid the formality of citing him to show cause why the order directing that a certificate be issued to him should not be set aside for failure to comply with the law and the rules and regulations of the Commission, as provided in Chapter 185, Laws 1925."

The Board of Public Utility Commissioners of New Jersey, in granting the application of a street railway company to discontinue service over a certain territory and to remove its equipment therefrom, pointed out that such equipment as tracks, poles, and other property were placed in the streets under ordinances of the municipalities, and that in removing the same from the streets upon the abandonment of trolley service the traction company must comply with the provisions of these ordinances, and that the order of the Board was to be subjected to such compliance. *Re Millville Traction Co.* Nov. 25, 1927.

2. Inadequate return.

The Pennsylvania Commission, in *Re Pennsylvania R Co. Application Docket No. 15,513*, Nov. 28, 1927, approved the application of a railroad for permission to abandon passenger service between two points where the evidence was conclusive that the revenue derived by the company from such service was insufficient to pay operating expenses, and that any curtailment of service by the reduction of the number of trips which would materially reduce the operating expenses would not provide trips at the hours which the testimony showed the service would be most used. The Commission further stated: "In every case of abandonment of railroad service there is some inconvenience to the communities served. If, however, the continued operation of the railroad involves losses to the company, wholly disproportionate to the service rendered, the railroad company is justified in discontinuance and the Commission should grant its approval thereof. When the public fails to support the service to the extent that the loss to the company in furnishing the P.U.R.1928B.

service steadily increases with no prospect for betterment in the future, the necessity for the service no longer exists."

In *Re Pennsylvania R. Co.* Application Docket No. 16,018, Dec. 20, 1927, the Pennsylvania Public Service Commission approved an application of a carrier to abandon a portion of its system extending to a territory formerly active in iron, timber, clay, and farm products. The evidence showed that these resources had decreased steadily and that the mining operation had ceased entirely causing any continuation of local service to be at a loss. The effective date of the discontinuance order was made simultaneous with that of an order of the Interstate Commerce Commission.

3. Improper actions of patrons.

The Ohio Commission found in *Weglau v. Cincinnati & Suburban Bell Teleph. Co.* No. 4903, Nov. 9, 1927, that the Cincinnati police department had directed the company to discontinue the use of a subscriber's station because of the arrest of a third party who was using the 'phone to transmit race horse results, but that the subscriber had not been involved in this misdemeanor, and that the police authorities had not made any representation against him. Upon these facts the Commission decided that since the complainant had made regular application for re-establishment of telephone service, he was entitled to receive and be furnished with defendant's services at his place of business, and the telephone company was ordered to restore such service.

III. Service by particular utilities.

a. Automobile.

A street railway operating busses supplementary to its traction system was permitted to route busses over different streets experimentally until the best routings for public convenience and necessity were determined, all current routes to be on file at all times with the Commission. *Re Nashua Street R. & Nashua Transp. Co.* (N. H.) J-195, Oct. 21, 1926.

b. Railroad.

In *Independent Ice Co. v. Great Northern R. Co.* Docket No. 988, Report & Order No. 1500, Dec. 21, 1927, the Montana Board of Railroad Commissioners held that a shipper of ice was entitled to demand during the summer season a car of the insulated type, but that by reason of the higher value of the service rendered the carrier was entitled to make an additional charge, the amount of which was not determined in the instant proceeding. It was said: "Admittedly ice is a perishable commodity. The National Perishable P.U.R.1928B.

Freight Committee, whose rules were admitted in evidence, recognize the fact and provide a type of car for the proper carriage of this commodity. Subdivision (3) of Rule 5, specifies: 'Beer or Ice Refrigerator Car: equipped with insulation but without ice bunkers or means of ventilation.' The fact that the carrier does not own nor control this type of equipment is not a sufficient answer to a shipper's demand when the tariff asserts the carrier's willingness to haul such perishable commodity."

The Nebraska State Railway Commission approved the application of a railroad to discontinue certain local passenger trains and to revise its schedule with regard to others in order to permit the installation of a sleeping-car service between two points not previously served in this manner. The Commission was of the opinion that the rearrangement would not inconvenience any appreciable portion of local patronage, but on the other hand in many instances would even improve local service. The Commission further stated: "With the privately owned automobile and bus, local passenger business has fallen off to such an extent that nearly all local trains are being operated at a loss, and where local trains can be coupled up with through trains so that the railroad company gets the benefit of the revenue from both classes of service, and at the same time reduce overhead expense of operation, they should be permitted to do so, keeping in mind at all times that the service offered by the railroad company is adequate to render the service to the territory through which they traverse." *Re Chicago, B. & Q. R. Co. Application No. 6973, Oct. 29, 1927.*

A railroad freight interchange point should be established in a proper place to avoid high rates necessitated by previously circuitous routes and to facilitate the movement of a principal commodity of a territory, where it plainly appears that the development of such industry will also eventually benefit the carriers through added traffic and aid dependent industries which would otherwise be seriously hampered by high freight rates. *Crystal Sand Co. v. Reading Co. (N. J.) Sept. 8, 1927.*

c. Street railway.

A street railway was permitted to take over, within the limits of its charter, existing bus routes previously operated with Commission approval by its own subsidiary company. *Re Nashua Street R. Co. (N. H.) J-195, Oct. 21, 1926.*

Tables and figures introduced at a hearing in an application of a street railway company for authority to operate one-man cars on certain routes indicated that for each month in the year of 1927 the chargeable accidents resulting from one-man car operation were *prop. U. R. 1928B.*

portionately less than for two-man car operation, and the Wisconsin Commission was of the opinion that one-man cars could be operated as safely as two-man cars and approved the use of the former on the route solicited. *Re Milwaukee Electric R. & Light Co.* R-3466, Dec. 12, 1927.

d. Telephone.

1. In general.

An inspection of telephone service upon complaint of subscribers, in *Warner v. Citizens Teleph. Co. (Mich.)* T-363, Nov. 22, 1927, revealed that the trouble was due to induction from a power line traversing the vicinity of the telephone circuits and the cause was dismissed by the Michigan Commission upon an agreement by the electric company to rearrange its lines to eliminate such interference.

The Railroad Commission of Wisconsin, in *Re Tri-County Teleph. Co.* U-3600, Dec. 20, 1927, in approving an application for authority to increase rates, objected to one part of the proposed schedule providing for charges for changing instruments or making changes in wiring and other equipment already installed. It was held that if the instrument required changing, it was the duty of the company to make the change, and any special work not covered by the charge for inside and outside moves should be performed at actual cost. The Commission did not authorize the clause in its order.

2. Directory listings.

The California Commission, in *California Fireproof Storage Co. v. Southern California Teleph. Co.* Decision No. 18769, Case No. 2175, Sept. 7, 1927, dismissed a complaint as to an alleged discriminatory charge for listing names in bold face type in the alphabetical section of directory, where the evidence showed that no contract along the line specified in the complaint was ever in force between the plaintiff and the defendant. The Commission had previously dismissed the same complaint because it believed that it did not possess jurisdiction over advertising rates, but the supreme court of the state upon the petition of the complainant had issued a writ of mandate directing the Commission to take and exercise jurisdiction over the subject-matter of the complaint.

The California Commission, in *Re Home Teleph. & Teleg. Co.* Decision No. 18767, Application No. 13702, Sept. 6, 1927, approved an application for modification of the Commission rule in the matter of filing of telephone directories which would permit the utilities to discontinue the practice of inserting listings in bold face type in P.U.R.1928B.

the alphabetical sections of their directories of business subscribers and of entering into contracts for inserting such listings. The Commission stated that inasmuch as the directories published by each applicant carried a classified business directory section in which business subscribers could be listed it appeared that no need existed for the continuance of the practice of inserting bold face listings of business subscribers in the alphabetical section.

The Illinois Commerce Commission, in *Longwood Drive Motor Sales v. Illinois Bell Teleph. Co.* No. 17702, Nov. 23, 1927, dismissed the complaint of the plaintiff against certain deposits required by the defendant for the continuation of telephone service to an automobile repair and service station, which had formerly been operated by two partners. It appeared that the plaintiff had taken possession of the premises and used the equipment installed under a contract by the defendant with the former firm, and without changing the directory listing "Longwood Drive Auto Service" until it made a request for measured service instead of the coin-collector service then installed in the premises. The company thereupon required a deposit of \$500 for the furnishing of such service and a deposit of \$200 for the continuation of the coin-box service, and served notice of its intention to discontinue service upon a failure to comply with the demand for either of these deposits. The Commission found that the telephone company had reasonable grounds for requesting the deposit from the complainant, which was not excessive and was in accordance with the rules and regulations of the company on file with the Commission.

3. Exchange areas.

The California Commission, in *Howard v. Southern California Teleph. Co.* Decision No. 18843, Case No. 2416, Sept. 29, 1927, dismissed a complaint asking that the Commission issue an order restraining the telephone company from removing telephone service from its Los Angeles exchange which appeared through error to have been installed in the complainant's residence located in an exchange area for which it had no legal rate. The Commission stated that the granting of complainant's request would result in discrimination in favor of complainant and against others similarly situated who might desire telephone service from the Los Angeles exchange, and that an enlargement of the Los Angeles exchange could not be made upon a petition signed by one complaining subscriber. Commissioner Carr dissented.

The California Commission, in *Smart and Final v. Associated Teleph. Co.* Decision No. 19007, Case No. 2382, Nov. 4, 1927, decided: "While in a complaint by an individual the only relief which P.U.R.1928B.

can be ordered is foreign exchange service to the complainant, defendant telephone utilities should make such service available to the public generally without necessitating a further proceeding before the Commission; otherwise a discriminatory situation would exist."

e. Water.

The scope of an application for increased water rates, in *Re Illinois Water Service Co.* No. 17398, Dec. 21, 1927, was widened by the filing of an agreement by the water company respecting additional construction work. This agreement appeared in part to be a consideration or motive for the withdrawal of objection to the proposed modified rates on the part of the municipalities affected. The Illinois Commerce Commission held that the filing of the schedule and statement of improvements was in effect an admission by the company of the necessity for the improvements and proceeded thereafter on the theory that an order requiring such construction would not be opposed.

NEBRASKA STATE RAILWAY COMMISSION.

RE COZAD MUTUAL TELEPHONE COMPANY.

[Application No. 6800.]

Rates — Telephones — Common battery service for the future.

1. Rates will not be authorized effective immediately for common battery service to be furnished at some indefinite future date, p. 697.

Return — Operating expenses — Salaries of officials.

2. The officers of a home managed telephone company should be paid a reasonable compensation for the services which they render, p. 699.

Valuation — Consideration of obsolescent property — Telephones.

3. Obsolescent property in a situation where a telephone utility is faced with the necessity of an immediate reconstruction program should be given outstanding consideration in the valuation of such property for rate-making purposes, p. 700.

Return — Efficiency of operation — Telephones.

4. Economy of operation where coupled with efficiency of operation should not be penalized but might well be recognized in giving consideration to proper annual dividends, p. 700.

Valuation — Obsolescent property — Telephones.

5. Increased rates were allowed on a temporary valuation based on a tentative estimate of investment less depreciation, with a reduction made necessary by reason of obsolescence in the utility property by reason of a probable necessity for reconstruction of the system from magneto to common battery, p. 700.

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Security issues — Dividends — Reinvestment of earnings — Telephones.

Discussion of the policy of investing earnings in property instead of declaring dividends, p. 698.

[November 9, 1927.]

APPLICATION of a telephone company for authority to increase rates at a local exchange; increased rates ordered.

Appearances: W. M. Cook, of Cook & Cook, Attorneys, Lexington, for the applicant; B. E. Forbes, Chief Engineer, for the Commission.

Curtiss, Commissioner: This application is presented by the Cozad Mutual Telephone Company of Cozad, requesting authority to publish and collect an increased schedule of rates for telephone service. Hearing upon the application was held at Cozad.

The schedule proposed is as follows:

	Per Month.	
	Gross.	Net.
One-party business metallic	\$4.75	\$4.50
Two-party business metallic	4.25	4.00
One-party residence metallic	2.75	2.50
Two-party residence metallic	2.25	2.00
One-party residence grounded	2.25	2.00
Extension stations business .....		.75
Extension stations residence .....		.50
Extension bells .....		.25
Service connection or switching per station .....		.40
Extra charge for desk telephones .....		.25

The rates proposed for supplemental service represented no change over those now published and collected, with the exception of the extra charge for desk telephones of 25 cents. No additional charge for desk service is now made by applicant.

The proposed schedule for exchange service represents a very sharp increase over rates now in effect, which are as follows:

	Per Month.	
	Gross.	Net.
One-party business metallic	\$2.75	\$2.50
Two-party business metallic	2.50	2.25
One-party residence metallic	1.65	1.40
Two-party residence metallic	1.50	1.25
One-party residence grounded	1.50	1.25
Extension stations business .....		.75
Extension stations residence .....		.50
Extension bells25
Service connection or switching per station (per annum) ..	6.00	4.80

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[1] The application recites the fact "that if the rates herein asked for are authorized, this company will in a short time be in a position to and will install the common battery system." However, at the hearing it developed that applicant feels that the financial obligation involved in changing from magneto to common battery, is too great a one to be assumed in the immediate future. It stated that it did not desire a rate schedule authorized which might be predicated on its ability to furnish common battery service. Its contention is that the present rate schedule is inadequate under existing conditions, and it proposes a schedule of rates which it feels will be sufficient for common battery service, such improved service to be furnished at some future date when the necessary financing is possible. The Commission could not authorize rates for common battery service, effective immediately, to cover such service to be furnished at some indefinite future date. Accordingly, such rate schedule as may be authorized herein will be on the basis of the company's present needs, with magneto service the basis for the Commission's conclusions. At such time as the company finds it possible and desirable to change from magneto service to common battery service, further application can be made for such schedule of rates as the company deems necessary. It is recognized that the schedule which will be authorized herein is inadequate for common battery service.

The company is happily situated, its properties being located entirely within the confines of the municipality. Cozad is a thriving, prosperous city, with a population of around 2,000 located in a splendid trade territory. It has enjoyed a rapid growth in recent years, which is reflected by the increased number of subscribers to applicant's service. For instance, in 1919, applicant served 268 business and residence subscribers. In 1926 it served 390 and its records for 1927 indicate still further growth. It owns no farm lines, furnishing switching service to this class of subscribers.

The company is home owned and home managed, the preponderance of stock outstanding being in the hands of Cozad citizens. Its officers are, in the main, prominent and successful

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business men of the community, who in the past have given generously of their time and talents in the conduct of the company's affairs, and until recent years, with little or no compensation therefor. Its public relations have been of the best; its properties have been well maintained, with a high type of service furnished.

The Commission is very familiar with the early history of the company. It has been discussed in some detail in previous orders. Suffice it to say here, that at the present time there are 269 shares of stock of the par value of \$13,350 outstanding. The dividend record of the company has been very modest. Prior to 1909, dividends were not paid directly, but rather through the medium of a lower rate to stockholders than to renters. From 1909 to 1918, cash dividends in amount of \$76 per share were paid. From 1918 to date, no cash dividends have been paid.

Applicant stresses this fact as indicating the necessity for increased rates. It states that it is this situation which embarrasses it in securing additional capital necessary in changing to common battery.

However, the company's records, in so far as it is possible to determine therefrom, indicate very definitely that at least in a number of years since 1918, dividends have actually been earned in some amount. Applicant, instead of paying dividends earned in cash, has reinvested them in property. As a result, the company has been able to finance its additions and betterments in part from this source, without the issuance of additional securities or without increasing its notes or accounts payable. The Commission is not condemning this practice where stockholders are familiar with it, offer no objection, and understand that dividends earned are reflected in additional properties rather than in dollars actually in the pocket. They should not be heard to complain of nonpayment of dividends when such is the case.

Unfortunately, however, because of the dividend record itself, this practice usually results in lessening of the market value of the stock, and resultant difficulty in selling additional securities when that becomes necessary. For this reason, the Commission encourages the regular payment of dividends earned on stock P.U.R.192SB.

outstanding. Where additions and betterments are necessary, additional securities can then be more easily sold.

It is probably true that the depreciation reserve has also been drawn upon to some extent, to supply capital necessary for additions and betterments. To whatever extent this is true, the ratepayer has supplied the revenue with which to build properties upon which the company now asks to earn a fair return. Unfortunately the company's books of account have not been kept in such a manner as to enable the Commission to determine definitely the exact amounts spent for additions and betterments during any particular year. Neither is it able to determine with any degree of exactness, dividends which have been earned and reinvested in property, or amounts taken from the depreciation reserve and applied to capital charges. It is known that revenue necessary for additions and betterments has been derived in some amount from each of these sources.

[2] The history of the company indicates that it has been the beneficiary of many donations on the part of stockholders and officers. Until the last two years, the officers of the company donated their services and paid employees received less than company officials felt they were really entitled to. Two years ago the company resolved to abandon this practice. A new wage scale for employees was adopted, and officials of the company have since been paid for services rendered by them. The Commission has reviewed the company's present wage scale and salaries paid its officers, and finds no cause for complaint. There is no good reason why officers of this company, which is home managed, should not be paid reasonable compensation for services which they render.

A careful review of the company's records would indicate that there is no occasion for a rate increase in order to increase the depreciation reserve account. The company's records indicate that its depreciation reserve has grown constantly during a period when considerable portions of the property were replaced. There is nothing to indicate that the amounts set aside for this purpose through the past years, have been inadequate. In fact, it is P.U.R.1928B.

quite possible that the company has set up more for depreciation reserve than its experience has indicated was actually necessary.

[3-5] Witness Hollister presented an exhibit showing the value of the property based on reproduction cost new, depreciated, as of November, 1925. The figure presented in Exhibit B shows reproduction cost new in amount of \$36,692, depreciated in amount of \$29,388. To this, witness adds \$1200 for working capital, making a total reproduction cost new depreciated of \$30,588. To this item, are added additions and betterments made subsequent to November, 1925, making a total figure as of the present, reproduction new depreciated, in amount of \$32,000. Exhibit I was also presented by the same witness, showing original cost, or investment cost of the same properties as of November 1, 1925. This exhibit shows an "estimated investment" as of the above date of \$31,687 and an "estimated investment less depreciation" of \$26,435. Each of these figures include an item of \$1200 for working capital. To this he adds amounts covering subsequent additions and betterments and finds a total estimated investment less depreciation of approximately \$30,000.

This witness, on cross-examination, conceded obsolescence in the properties, particularly the switchboard and telephone instruments, such obsolescence being the greater because of the probability of change in the near future from magneto to common battery. The Commission feels that such obsolescence, under the existing circumstances, is a matter of importance and should be given outstanding consideration. For this reason, it finds that the figures submitted by this witness must be reduced. Having in mind the fact that the change from magneto to common battery service will make radical changes in important units of the present plant, with consequent changes in its fair value, the Commission's further consideration of fair value will be necessary when such change is made. Accordingly, for the purposes of this case, while no final finding of fair value will be made, a rate is being authorized which the Commission believes will permit of a fair return being paid upon a value of not less than P.U.R.1928B.

\$28,000. Since the securities outstanding are in amount considerably less than this, this will allow a very generous dividend on stock outstanding after all interest charges have been paid.

Increased salary expenditures and the increased value for earning purposes, necessitate of themselves increases in rates. The Commission is not disposed to penalize economy of operation where coupled with efficiency of operation. The subscribers of this company have for a number of years, benefited by the high efficiency of local management. Such efficiency may well be recognized in giving consideration to proper annual dividends.

The company's public relations are of the best. No objectors appeared at the hearing. In fact, a resolution was presented by Dave F. Stevens, editor of the only newspaper in Cozad, on behalf of the members of the Commercial Club of Cozad, indicating their interest in adequate rates for applicant, and concluding as follows:

"Therefore, be it resolved by the Commercial Club of Cozad, Nebraska, that this Chamber of Commerce does hereby endorse the application of said telephone company for authority to increase rates, and does hereby petition the Nebraska State Railway Commission to grant to said telephone company a sufficient increase in rates to enable said company to pay its operating expenses, create a reserve to cover depreciation, and pay to the stockholders a fair return on their investment."

The resolution was unanimously adopted. The Commission seldom witnesses such splendid community co-operative spirit. The schedule of rates authorized herein, will produce additional revenue per month, exclusive of revenue from additional charges for desk sets, in amount of \$142.50. Applicant reports 155 desk telephones, making a further additional revenue of \$38.75 from this source, or a total additional revenue from increased rates of \$181.25 per month, or \$2,175 per annum. The Commission believes this additional revenue will take care of all legitimate operating expenses, and in addition provide for a very generous return upon the stock outstanding.

In the immediate future the Commission's accounting department will more definitely instruct the company's bookkeeper as P.U.R.1928B.

to the uniform system of accounts prescribed by it. With the books kept in conformity with this uniform system in the future, the company and the Commission will have definite information as to the effect of the increased rate schedule.

Undoubtedly in the near future, applicant company which serves this prosperous growing community, will desire to make further application for a schedule of rates which will be adequate and sufficient for common battery service.

ORDER.

It is therefore *ordered* by the Nebraska State Railway Commission, that the Cozad Mutual Telephone Company of Cozad, Nebraska, be and the same is hereby authorized and directed, effective December 1, 1927, to publish and collect the following schedule of rates at its exchange at Cozad:

	Per Month.	
	Gross.	Net.
One-party business, metallic	\$3.25	\$3.00
Two-party business, metallic	3.00	2.75
One-party residence, metallic	2.00	1.75
Two-party residence, metallic	1.75	1.50
One-party residence, grounded	1.75	1.50
Extension stations, business .....		.75
Extension stations, residence .....		.50
Extension bells .....		.25
Desk sets, extra .....		.25
Service connections or switching per station (per annum) ..	6.00	4.80

It is *further ordered* that the company's present rule with respect to the collection of the gross and net rate, shall be continued of full force and effect.

NEW JERSEY BOARD OF PUBLIC UTILITY COMMISSIONERS.

DIXIE CANDY COMPANY

v.

ATLANTIC CITY ELECTRIC COMPANY.

Payment — Meter reading — Failure to read and remove meter.

1. An adjustment should be made in an unusually high bill cover-
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ing a period when service was not received and resulting from the reading of a meter after its removal by house wreckers because of the failure of the utility company to read and remove it upon receiving notice that the building in which it was located would be torn down, p. 703.

Payment — Service discontinuance to enforce — Consumer's deduction as refund.

2. The Board will not permit a discontinuance of service, if, in payment of future bills a consumer deducts an amount already paid under protest in excess of what the Board has approved as a reasonable charge, where it lacks authority to order a cash refund of the excess, p. 703.

[January 24, 1928.]

COMPLAINT of excessive charge for electric service; complaint allowed.

Appearances: S. Levinson for Dixie Candy Company; Joseph Thompson for Atlantic City Electric Company.

By the **Commission**: [1, 2] This matter comes before the Board upon complaint of the Dixie Candy Company, alleging an excessive charge for electric service between October 27, 1926 and November 10, 1926. The amount of the bill for service is \$69.16. It appears that prior to October 27, 1926, the complainants obtained their service from a building in which they conducted a store. Notice was given by the complainant to remove the meter on November 10th, as the building was being torn down. A representative of the company called on November 10th to remove the meter and he testifies that someone in the complainant's store requested that the removal be deferred until further notice. He does not know who gave him these instructions and admits it was not anyone in authority in the complainant's business.

Testimony shows that the complainant moved on November 10th, the day upon which the meter was to be removed, and continued service with the respondent at another address. On December 23rd the company's representative found the meter had been removed and was in the shack of the contractor engaged in demolishing the building in which the complainant's store
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was formerly located. He took the reading from the meter at that time.

The Board is satisfied that no service was used by the complainant after November 10, 1926, and that the company's representative without responsible authority, failed to read the meter until December 23rd. The amount of the bill is unusually high for the period between October 27th and November 10th. No one seems to know whether service was had through this meter after the complainant moved but the Board is of the opinion that the complainant's account should not be based upon the meter reading on December 23rd. The company should have complied with the complainant's original instructions to remove the meter on November 10th and there seems to be no question but that some adjustment should be made in the bill. It appears that the complainant paid the bill under protest to prevent the turning off service at complainant's present address. It is the Board's opinion that a credit should be given the complainant of 50 per cent of the amount of the bill. Under the circumstances it would be equitable for this to be paid at once to the complainant but the Board lacks authority to order this. If the company does not make such payment, the Board will not permit discontinuance of service, if, in payment of future bills deductions are made therefrom by the complainant until the total of such deductions amounts to \$34.58, which is 50 per cent of the disputed bill.

CALIFORNIA RAILROAD COMMISSION.

RE POMONA VALLEY TELEPHONE & TELEGRAPH
UNION.

[Decision No. 19028, Application No. 12863.]

Rates — Toll service — Telephones — Factors to be considered.

1. The particular requirements of the territory under consideration, the effect a change in method of charging for telephone service may have, and the particular local service conditions must all be studied in a proceeding to inaugurate toll rates and, if the reasonable interests of the large majority of the subscribers require such rates, then the personal interests of the few should give way to such requirement, p. 709.

Rates — Telephones — Factors to be considered in flat or toll rate.

2. Factors to be considered in changing from flat to toll rates are the extent of territory served, the extent of community interest, the amount of intracommunity telephone traffic as compared with other traffic, comparison of cost of the service under both plans to the majority and to the minority, and the consideration of operating conditions under both plans, p. 709.

Rates — Telephones — Toll charges — Cost of operation.

3. The adoption of toll rates for service where the cost of operation in carrying charges in connection with each such toll message would be materially increased over that which would obtain for a flat rate with untimed calls, is not justified unless other conditions outweigh and require such toll rates, p. 712.

Return — Telephones — Percentage allowed.

4. A telephone company earning approximately a 5 per cent return on a reasonable rate base was held to be entitled to an increase in rates and charges that would provide for a greater profit, p. 714.

Service — Telephones — "Temporarily disconnected" service.

5. Arrangements should be made for intercepting service in connection with "temporarily disconnected" stations where the practice of giving a call for such station a "do not answer" report instead of "referred service" is misleading and results in repeated attempts to call the same number at the operating expense of the utility, p. 715.

[November 10, 1927.]

APPLICATION of telephone utility for increased rates for service; increase ordered.

Appearances: R. K. Pitzer and Ernest Irwin, for applicant; C. R. Stead, for city of Pomona; W. T. Clarke, for Chino Chamber of Commerce; R. C. Homan, City Attorney, for city of Chino; J. T. Brooks, for Business Men's Association of Claremont; J. T. P.U.R.1928B.

Marshall, for Ontario & Upland Telephone Company; Frank Forster, for Knights of Pythias of Pomona; Fred Whyte and F. D. Wallenstein, for Pomona Citizens' Committee and the Chamber of Commerce; A. V. Storer, for Pomona Valley Merchants' Credit Association; J. J. Deuel and L. S. Wing, for California Farm Bureau Federation and W. A. Johnstone; W. M. Avis, for Pomona Realty Board; D. G. Arbuthnot and E. H. Boly, for the La Verne Chamber of Commerce; Paul Houghton, for the Claremont Chamber of Commerce; L. C. Bell, Chairman of the Board of Trustees of the city of Claremont; C. R. Harford, representative of Chino; S. H. Park, Mayor of the city of Pomona, for the city of Pomona; A. Durward, President of the Board of Trustees of La Verne, for La Verne; Ernest Irwin, for California Independent Telephone Association.

Whitsell, Commissioner: In this proceeding, Pomona Valley Telephone & Telegraph Union, sometimes hereinafter termed the Pomona Union, requested an order authorizing a revision of its rates for telephone service, authorizing the division of its territory into several exchange areas and the establishment of interexchange toll service and rates.

The Pomona Union made and submitted to the Commission an appraisal of its property upon which it desires to earn a return by increased rates for exchange service and by toll rates which it desires to make effective in portions of its exchange territory, namely, between its Chino exchange and its other exchanges and between its San Dimas exchange and its other exchanges.

Public hearings in the matter were held in Pomona on November 9 and 10, 1926, and on March 15, 16, and 17, 1927, after its consolidation with Application No. 1330S.

History of Pomona Valley Telephone and Telegraph Union.

The first telephone service in the Pomona Valley was established in the year 1886 by means of a toll station of the Sunset Telephone & Telegraph Company, which company extended its operations and later became a part of the Pacific Telephone & Telegraph Company's system. The Pomona Union began service in this territory in September, 1903, and gradually extended its service first into San Dimas and then into Chino in P.U.R.1928B.

1910, when the Home Telephone & Telegraph Company's telephone plant at Chino was leased. Central offices were established in Pomona, Claremont, Chino, San Dimas, and La Verne. In its Decision No. 161 in Application No. 111, decided July 23, 1912 (see 1 Cal. R. C. R. 362), the Railroad Commission authorized the Pacific Company's withdrawal of local exchange service from the territory. Long distance service to the Pomona Union's customers was thenceforth available over the lines of the Pacific Telephone & Telegraph Company or the United States Long Distance Telephone & Telegraph Company, at the option of the customer. The Union has experienced a consistent growth and now has more than 7600 stations in service.

General.

This proceeding has been the occasion of widespread interest in the Pomona Valley and a large number of appearances were entered. The proposed establishment of toll service and rates within the territory of the Pomona Union occasioned considerable opposition at the hearings in the matter. Some of the people of Chino were particularly concerned since it was proposed in this application to establish toll service between that city and other points in applicant's exchange territory and, in Application No. 13308, request was made for authority to discontinue the so-called free service between Chino and Ontario. In this proceeding applicant filed fifteen exhibits and the California Farm Bureau presented three exhibits in connection with oral testimony. The investigations of the Commission's engineers and accountants were extensive in character.

Valuation and rate base.

The Pomona Union, at the time of its application, submitted to the Commission an inventory and appraisal of its property based on the so-called "historical reproduction cost" as of January 1, 1924, amounting to \$571,977.81. Although applicant does not actually own the Chino plant, it has included that property in its inventory and its appraisal includes the fixed capital assets of that plant. The inventory was checked by Commission engineers and was found to be reasonably accurate.

Tangible fixed capital accounts were included with organization P.U.R. 1928B.

tion and franchise intangible accounts in the appraisal submitted. The prices used were those known to have prevailed at the time when the construction was in progress. Land was appraised at present day prices by real estate operators in the several cities in which the parcels were located.

This appraisal was checked by Commission engineers, who submitted a modified appraisal of the property on the historical reproduction cost basis, undepreciated, at a later hearing amounting to \$524,310, less material and supplies.

The Pomona Union also submitted a "Determination of present value," in which the "Reproduction cost" claimed was \$812,283.65 as of September 1, 1926. The "present fair value" claimed by applicant as of that date was \$729,231.78 and included \$70,166.15 for "going value," which was purported to be made up of organization, cost of securing new subscribers, and interest during preliminary construction. This appraisal is based largely upon hypothetical assumptions which the record fails to adequately justify.

Using the amount \$524,310, which they had estimated for the property of applicant, the Commission's engineers further estimated an average rate base for the period January 1, 1927, to December 31, 1927, for a full flat rate schedule, as follows:

Estimated historical reproduction cost as of January 1, 1924 ..	\$524,310.00
Additions and betterments, January 1, 1924, to December 31, 1926	121,440.00
Estimated additions and betterments January 1, 1927, to June 30, 1927	10,000.00
Materials and supplies and working cash capital	28,600.00
Total	\$684,350.00

Later evidence given in this matter indicated that contemplated additions and betterments to applicant's plant would require a greater expenditure than that set forth above and this is given proper weight in the consideration of a reasonable rate base. After reviewing the valuations submitted and all related evidence before us in this proceeding, I am of the opinion that \$695,000 should be found reasonable as a rate base herein.

Expenses.

Applicant presented an estimate of operating expenses under its proposed rates for the period September 1, 1926, to August P.U.R.1928B.

31, 1927, amounting to \$141,098.84. Its estimate under its proposed alternate rates (which are on the flat rate basis) for the same period was \$137,682.24. Commission's engineers estimated applicant's operating expenses for the period January 1, 1927, to December 31, 1927, under the proposed rates to be \$132,700, and under the proposed alternate rates \$128,200.

The time period of the applicant's estimates is different from that used by the Commission's engineers, but in other respects comparisons can be made properly one with the other. It should be noted that evidence introduced at the hearing showed that the Pomona Union had been in error in accounting for certain expenditures in a manner that resulted in incorrectly large maintenance expenses and in book entries which did not show the full value of plant installed. The estimates of the Commission's engineers appear to more nearly reflect that which should be expected in the future under proper allocation of charges of cost of plant placed. It should be noted that the applicant and the Commission's engineers estimated considerably higher expenses under the partial toll plan than under the flat rate plan. I believe that an allowance of \$128,600 for operating expenses for the year 1927 will permit the Pomona Union to properly maintain and operate its system in an efficient manner under a system of flat rates and that, if partial toll rates were established, such allowance would have to be increased by approximately \$4,000.

Rate plan.

[1, 2] The Pomona Union, in its amended application, among other things, requested authority for the establishment of certain toll interchange services and rates. It was proposed to divide the Pomona exchange into three separate and distinct exchanges, namely, Chino exchange, comprising the city of Chino and certain surrounding territory, San Dimas exchange, comprising San Dimas and vicinity, and Pomona exchange, which would then be made up of the remaining territory and would include the cities of Pomona, Claremont, and La Verne and their environs. Exchange service at flat rates was proposed for each of these three exchanges and toll telephone rates for interchange service between them and outside points. The determination P.U.R.1928B.

of whether or not interexchange toll rates should be established within the present Pomona exchange area is one of the phases of this proceeding seemingly most difficult of solution. Very frequently, due to increase in cost, the rates for service in an exchange approach too nearly the value or fancied value of the service to many users of the service, under which circumstances it may be found more equitable that the area be divided into two or more exchange areas and that exchange service in each exchange be under flat rates and that service between such exchanges be on a charge per message or toll basis. Telephone companies, generally, have held this to be a fundamental principle in rate making. It should be pointed out, however, that it is almost as great an error to adopt this plan prematurely as to fail to apply it at the opportune time. In other words, the particular requirements of the territory under consideration, the effect of a change in method of charging for the service may have, and the particular local service conditions must all be studied in a proceeding of this nature. If the reasonable interests of the large majority of the users of the service require that toll rates be established, then the personal interests of the few should give way to such requirement. There is community interest between all localities of a state; in fact, it may be said that community interest exists throughout the country but, of course, in a greater or lesser degree in each case considered; therefore, community interest is not controlling, for there must be some limit to the extent of flat rate telephone service. Among the factors which should be considered before a final determination is reached to change from flat to toll rates are: (1) the extent of the territory served; (2) the extent of the community interest between the several sections and the amount of intracommunity telephone traffic within these communities as compared with the intercommunity traffic; (3) comparison of the cost of service to the majority of the telephone users under the two plans and effect of flat rate plan on charges to the smaller users of the service; (4) consideration of present and proposed method of operating system.

1. Extent of the territory served.

The Pomona Union renders telephone service in the five communities U.R.1928B.

munities of Pomona, Claremont, La Verne, and San Dimas in Los Angeles county, and Chino in San Bernardino county, and in their surrounding territories, a district which extends probably fifteen miles in at least one direction. Distances between points in the territory are, therefore, not too great for efficient complete local exchange service, provided other factors are equally as favorable for a unified flat rate service.

2. Community interest and telephone traffic.

Considerable testimony was given relative to community interest between the several cities and towns in the exchange territory and relative to the weight of such community interest in the determination of whether or not certain toll rates should be established by the utility.

A review of the evidence in this proceeding, as given in verbal testimony and in exhibits, indicates that there is a considerable telephone traffic among all of the communities of the Pomona Union territory and with those near by. It was indicated in the studies presented that a large per cent of the originating calls in each community studied were intracommunity calls. Quite a large percentage of the outgoing intercommunity calls from Claremont, La Verne and San Dimas were to Pomona. Chino is shown to have a greater number of calls to Pomona, its nearest neighbor in the Pomona area, than to the entire Ontario-Upland exchange by the toll route plus the number of attempts over the so-called free service route. It is also noticeable that the per cent of traffic from San Dimas to La Verne and from La Verne to San Dimas was quite high. A review of the traffic studies presented indicates that the outgoing calls from one of these communities to another decreases somewhat as the distance therefrom increases.

3. Comparison of cost of service under the two plans.

The evidence in this case indicates that the amount of the toll revenue account would be increased some \$7,000 or \$8,000 if the interexchange toll rates were introduced into the Pomona Union's territory for service between parts thereof, as requested, and the telephone operating expenses would be increased between \$4,000 and \$5,000, with a net gain in revenue of possibly \$3,000 P.U.R.1928B.

over the condition which would obtain under a system of all flat rates. The estimated rate base submitted by applicant for the period September 1, 1926, to August 31, 1927, is greater by approximately \$2,800 for the partial toll plan than for the flat rate plan. In the rate bases estimated by the Commission's engineers for the period January 1, 1927, to December 31, 1927, that for the partial toll plan was the greater by some \$5,300. The schedules of rates attached hereto and marked Exhibit "A" are not so high as to seriously retard telephone development in this utility's territory.

4. Present and proposed method of operation.

[3] The Pomona Union's Claremont, Chino, La Verne, and San Dimas service is "auto-manual," with no one in attendance at any of the central offices in these districts. Every call from any station in these exchanges is automatically sent over a "control trunk" to the Pomona office, where it is challenged by an operator who, by means of a keyboard and machine equipment, causes the desired connection to be set up, after which she has no further control in the operation, the calling party's disconnect being accomplished automatically. A "control trunk" is used in the operation of such a call until the operator has performed her work in the operation, after which the trunk is released. When the call is for a number in another office, in addition to the momentary use of a "control trunk," an interoffice "talk trunk" is employed until the release of the connection. If the calls from Chino and San Dimas were to be charged for on a message toll basis they would, as now, go to the Pomona office, where, instead of being trunked directly through by means of machine switching equipment, they would be connected through a toll switchboard and there be timed. The character and arrangement of outside facilities and central office equipment in this system are such that the introduction of toll board transmission losses might result in unsatisfactory service conditions. A saving in trunks necessary to carry the traffic might be made only if the use of the service were lessened or if the average holding time were found to be shortened. It seems apparently that the cost of operation and carrying charges in connection with each such

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toll message would be materially increased over that which would obtain for a flat rate untimed call. It would seem difficult to justify the adoption of toll rates for service under these conditions except other conditions outweigh and require such toll rates. It is possible that local methods of operating in this utility's exchange zones may some time be so changed that territorial arrangements and telephone and industrial development may be so different from the conditions now existing that a modification to a partial or complete toll basis of operation will be advisable. For some time to come telephone service in the territory of the Pomona Union should be rendered under flat rate schedules.

The decision reached in this matter is based upon the conditions now existing and it should not be presumed that we are finding that this type of rate structure will be suitable if the further development of the art or later performance convinces us that a different basis of rate making can be devised.

Service.

There are some phases of applicant's service which are deserving of commendation and others which can well be improved.

The service operations of the Pomona Union seem to be meeting the requirements of its customers since no complaints of interruptions of its service were received at any hearing in the matter and available trouble records show the trouble performance to be quite satisfactory. No complaint of delay in the completion of orders for service was heard. Maintenance practices of the Pomona Union can be improved by the establishment of schedules of routine inspections and testing of equipment and a rigid adherence to such routine procedures. The utility's overall service performance appears to be quite credible.

Rates.

In the applicant's alternative flat rate schedule are set up rates which were different for the same grade of service in different districts. It would appear that the rates for like grades of service in these different districts should be the same under the same conditions and those herein found reasonable are determined by P.U.R.1928B.

mined upon such a basis. The Pomona Union proposed base rates for business service on one-, two- and four-party lines and residence service on one-, two-, four-, five-, six- and eight-party lines. It is also noticeable that a great majority of the residence services in the city of Pomona are on the ten-party schedule. All eight-party and ten-party service is furnished on a semiselective basis while other services within the several primary rate areas are of the higher grade full selective type. The schedules of rates herein found reasonable will include an eight-party residence rate for the reason that many of the applicant's customers evidently desire a multi-party service. The present ten-party business service in Pomona, La Verne, and San Dimas and eight-party business service in Claremont should be discontinued and the rate schedules herein found reasonable will not provide a rate for such services.

Revenue.

[4] The Commission's engineering department has estimated that, under present rates, the Pomona Union would receive a total gross revenue of \$180,700 for the period from January 1, 1927, to December 31, 1927. Deducting operating expenses, taxes, uncollectibles, and other minor items estimated for the year 1927, totaling \$145,700, a net amount for interest and return of \$35,000 remains. This is equivalent to approximately 5 per cent return on the rate base found reasonable in this proceeding. It is apparent that Pomona Union is entitled to an increase in its rates and charges for service which will add an amount to its revenue sufficient to provide a greater return. Pomona Union's income statement estimated for the period January 1, 1927, to December 31, 1927, under the schedule of flat rates set forth in Exhibit "A," attached hereto, is shown in the table following:

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STATEMENT OF ESTIMATED INCOME
Under Rates Set Forth in Exhibit "A."
Pomona Valley Telephone and Telegraph Union
January 1, 1927, to December 31, 1927.

Telephone operating revenue.

Subscribers' station revenue	\$178,700.00	
Miscellaneous exchange revenue	200.00	
Message tolls and commissions	19,300.00	
		<u>\$198,200.00</u>

Telephone operating expenses.

Maintenance expenses	\$63,900.00	
Traffic expenses	34,000.00	
Commercial and general expense	30,700.00	
		<u>128,600.00</u>

Net telephone operating revenue		<u>\$69,600.00</u>
Uncollectible operating revenue	\$1,000.00	
Taxes assignable to operations	17,400.00	

Deductions from net operating revenue	<u>18,400.00</u>	
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Operating income	<u>\$51,200.00</u>	
Less rent deductions	600.00	

Net for interest and return	<u>\$50,600.00</u>	
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Operating practices.

[5] While the operating instructions and practices of the Pomona Union are generally ample for the guidance of the operating forces in the rendering of a service satisfactory to its customers, it should be noted that no "referred service" is given when a call is received for the telephone number of a service which has been "temporarily disconnected." Failure to do this results in the calling party receiving a "don't answer" report, which is unsatisfactory and which many times is followed by repeated attempts to call the same temporarily disconnected number at added expense to the utility. Reasonable efforts should be made to arrange at an early date for intercepting service in connection with such temporarily disconnected services. In the outlying offices no "referred service" is given in connection with changed or permanently disconnected numbers and the same objection obtains as in the case of temporarily disconnected numbers as above mentioned. Information service, as given by this utility, is sufficient in quantity and quality to meet the requirements of the service.

Service observations or samplings of the service are made to a limited extent and in so far as they are representative they P.U.R.1928B.

indicate no particular fault with the service operations of the Pomona Union; however, the number and scope of these service observations should be extended.

Primary rate areas.

Applicant desires to form primary rate areas in each of five exchange areas or zones as shown on maps submitted at the hearing. The primary rate area in any exchange is the more closely built up section within all parts of which the base rates apply equally and outside of which is the suburban area in which the base rates increased by mileage charges apply. It is to be noted that the primary rate areas as proposed were generally liberal in extent; however, some criticism was voiced at the hearing on account of territory not included in the primary rate areas and requests for changes were made. The boundaries of these primary rate areas were inspected by engineers of the Commission and testimony thereafter given concerning their locations. Some changes should be made in the boundary lines of these primary rate areas as submitted by applicant and maps thereof, as marked Exhibit "B," show the extent of such areas as are herein found reasonable.

Suburban zones.

Applicant submitted a map showing the boundaries of its exchange territory and setting up suburban zones numbered 1, 2, and 3. It appears that the suburban area of this territory should be divided into two suburban zones as shown on the map in Exhibit "C" attached hereto. It appears further that authorization of a change in the boundary of the territory served as requested should not be given in the order of this decision. Changes in the location of dividing lines between Pomona Union's territory and adjacent territories may better be arranged after informal investigations, as suggested in the opinion in Decision No. 19020 in Application No. 13308.
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INDIANA PUBLIC SERVICE COMMISSION.

Re NORTHWESTERN INDIANA TELEPHONE COMPANY et al.

[No. 9067.]

Sale — Evidence of stock ownership — Telephones.

1. Evidence as to the ownership of stock in a telephone utility is pertinent and material to the consideration of a petition for authority to purchase such stock by two other telephone companies, p. 729.

Intercorporate relations — Evasion of laws regulating stock buying in competitors by holding companies.

2. An admission by an official of a telephone company that the plant superintendent of his company was also a director "by courtesy" of a holding company on the board of another utility to "represent the interest" of the first utility which claimed to have no money invested in the second, led to the conclusion that the spirit if not the letter of a law (§ 95 Public Service Commission Act) providing that no public utility should by any means acquire "property, stock, or bonds" of another similar utility without Commission authority, had not been followed, p. 730.

Intercorporate relations — Qualification of officers — Local residence.

3. A law (§ 18, Public Service Commission Act) providing that the majority of the board of directors of every utility operating within the state should be bona fide residents and citizens of that state is violated when three of five directors of domestic telephone company are residents and citizens of another state, p. 733.

Sale — Division of purchased utility property — Telephones — Public interest.

4. Property of a telephone utility proposed to be divided between two neighboring companies must be divided along lines indicating that public interest has been considered rather than arbitrary separations dictated by the interest of stockholders if the transaction is to merit the approval of the Commission, p. 733.

Sale — Illegal practices — Telephones.

5. A petition by two neighboring telephone exchanges to divide the property of another utility in the territory by the acquisition of capital stocks and assets was denied where the evidence showed that laws respecting the purchase of stock in one utility by another and regarding the qualification of directors had been evaded and violated, respectively, and that the proposed division was without regard to public convenience and without consideration of the public sentiment of the subscribers affected, p. 735.

(MCCARDLE, Commissioner, dissents.)

[December 16, 1927.]

PETITION of a telephone utility to sell and of two other
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telephone companies to purchase the capital stock and assets of the first company; denied.

Appearances: Emmett F. Branch, Attorney for the Winona Telephone Company; William Daily, Attorney for the Northwestern Indiana Telephone Company; L. L. Bomberger, Attorney for Crown Point Telephone Company; C. E. Stanton and E. S. Miller for City Council of Valparaiso; William A. Bossey, for Chamber of Commerce of Valparaiso; D. L. McKessen, for Winona Telephone Company; Bruce B. Loring, for Committee of Citizens of Valparaiso.

Ellis, Commissioner: On August 17, 1927, the petition of the Northwestern Indiana Telephone Company to sell, and of the Winona Telephone Company and Crown Point Telephone Company to purchase the capital stock and assets of said Northwestern Indiana Telephone Company was filed with the Public Service Commission of Indiana. Said petition, omitting caption, is as follows:

"Your petitioners respectfully represent that petitioner Northwestern Indiana Telephone Company is a corporation organized under the laws of the state of Indiana, with its principal office and place of business in Valparaiso in said state, and that it operates a system of telephones and telephone exchanges in said city of Valparaiso and in the towns of Chester-ton, Wheeler, and Kouts, in Porter county, and in the city of Hobart, Lake county, all in the state of Indiana; that the petitioner Winona Telephone Company is likewise a corporation organized under the laws of the state of Indiana, owning and operating a system of telephones and telephone exchanges in the city of Plymouth, Marshall county, and in the city of Knox, in Starke county, and in the city of Winimac, in Pulaski county, and others, all in said state, and having its principal office and place of business in the city of Knox, Indiana; that that petitioner Crown Point Telephone Company is a corporation organized under the laws of the state of Indiana, and owning and operating a telephone exchange and system of telephones in the city of Crown Point, and its vicinity, in Lake county, Indiana.

"That each and all said petitioners are public utilities en-P.U.R.1928B.

gaged in the furnishing of telephone service to the public for hire within the state of Indiana.

"That the corporate capital of petitioner Northwestern Indiana Telephone Company is comprised as follows: 1500 shares of common capital stock of the par value of \$100 each, all outstanding; 1000 shares of first preferred stock of the par value of \$100 each, all outstanding; 1000 shares of second preferred stock of the par value of \$100 each, of which 831 shares are outstanding; that the corporate capital of petitioner Winona Telephone Company is comprised as follows: 2000 shares of common capital stock of the par value of \$50 each, all outstanding; 2000 shares of preferred stock of the par value of \$100 each, of which 1830 shares are outstanding; that the corporate capital of petitioner Crown Point Telephone Company is \$65,000, divided into 650 shares of the par value of \$100 each, all outstanding.

"That it is the desire of the petitioner Northwestern Indiana Telephone Company, as expressed by its stockholders and board of directors, to liquidate and retire from business, and it is the desire of all of the petitioners, as expressed by resolution of their respective board of directors, that the business, plant, assets, and territory of petitioner, Northwestern Indiana Telephone Company be acquired by the petitioners Winona Telephone Company and Crown Point Telephone Company, under the terms and conditions of a certain contract dated June 23, 1927, a true copy thereof being hereto attached as Exhibit 'A', and made a part hereof.

"That the method proposed for accomplishing the aforesaid purposes is as follows, to wit:

"(a) Petitioner Winona Telephone Company shall acquire and own 900 shares of the common capital stock, 600 shares of the first preferred stock, and 500 shares of the second preferred stock of petitioner Northwestern Indiana Telephone Company, for which petitioner Winona Telephone Company proposes to pay the sum of \$307,500, and said petitioner avers that the stock to be acquired by Winona Telephone Company is worth at least said sum of \$307,500.

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"(b) Petitioner Crown Point Telephone Company shall acquire and own capital stock of said Northwestern Indiana Telephone Company, as follows, to wit: 600 shares of common stock, for which it proposes to pay \$202 per share; all of the remaining first preferred stock over and above the aforesaid 600 shares to be purchased by petitioner Winona Telephone Company, for which it, said Crown Point Telephone Company, proposes to pay \$103 per share; all of the remaining second preferred stock over and above the 500 shares which petitioner Winona Telephone Company proposes to purchase, for which petitioner Crown Point Telephone Company proposes to pay \$101 per share, that as to such of said preferred stock as may not be purchasable at the aforesaid price, said Crown Point Telephone Company will furnish to said Northwestern Indiana Telephone Company funds to redeem the same, not to exceed the above mentioned prices per share, making a total consideration to be paid by petitioner Crown Point Telephone Company of approximately \$195,000, and said petitioner avers that the stock to be acquired by Crown Point Telephone Company is worth at least said sum of \$195,000.

"(c) Upon the completion of the purchase of stock as aforesaid, it is proposed that petitioner Winona Telephone Company surrender to petitioner Northwestern Indiana Telephone Company, for cancellation, all of the common and preferred stock of the latter company acquired by the former company, as herein set forth, upon delivery, conveyance, and transfer to said Winona Telephone Company of the telephone plant and property of said Northwestern Indiana Telephone Company, to be acquired, owned, and operated by said Winona Telephone Company as hereinabove set forth; that thereupon, to wit: after the transfer of said stock, as aforesaid, and after the purchase by the petitioner Crown Point Telephone Company or redemption by Northwestern Indiana Telephone Company of all of the outstanding preferred stock of said Northwestern Indiana Telephone Company, the petitioner Northwestern Indiana Telephone Company, in consideration of the surrender for cancellation of all of its stock then held or redeemed by said Crown Point Telephone P.U.R.1928B.

Company, will deliver, convey, and transfer to said Crown Point Telephone Company, all of the remaining telephone plant and property of said Northwestern Indiana Telephone Company, upon the assumption by Crown Point Telephone Company of all liabilities thereon and thereof, and thereafter dissolve its corporate existence.

"Petitioners further show and represent to the Commission that the value of the property of Northwestern Indiana Telephone Company is at least the amount of the purchase price to be paid by Winona Telephone Company and Crown Point Telephone Company.

"Petitioners further represent that the property and telephone plant of the petitioner, Northwestern Indiana Telephone Company, which it is proposed that petitioner Crown Point Telephone Company acquire, is located adjacent and convenient to the present telephone plant and territory of petitioner Crown Point Telephone Company, and can readily be operated in connection with the existing property and plant of the said Crown Point Telephone Company in a practical and economic manner and in the public interest and to public advantage; that likewise the property proposed to be acquired, owned, and operated by Winona Telephone Company is adjacent to and connected with other properties and plants of said company, and can and will be operated in a practical and economic manner and in the public interest and to the public advantage.

"Wherefore, your petitioners pray that the Commission assume jurisdiction of this petition; that it proceed to investigate and ascertain the facts concerning the proposals herein set forth; that it enter an order in due course, approving the proposed acquisition of the stock of said petitioner Northwestern Indiana Telephone Company by the other petitioners in the manner herein outlined, and that it further approve the division and transfer of the present property and plant of said Northwestern Indiana Telephone Company between the other petitioners, and the transfer of the franchises, rights and privileges thereunto appurtenant, and the liquidation of said Northwestern Indiana Telephone Company.

phone Company, and that it make all other proper orders upon such terms and conditions as to the Commission may seem fit.

"Respectfully submitted,

Northwestern Indiana Telephone Company

By (signed) H. R. Ball, its President.

Winona Telephone Company

By (signed) Sam Tomlinson, its President.

Crown Point Telephone Company

By (signed) L. C. Jones. Its Vice-President."

Attached to petition were Exhibits as follows:

"Exhibit A.

"This Agreement, made this 23rd day of June, A. D. 1927, by and between Winona Telephone Company, an Indiana corporation, hereinafter called 'Winona', party of the first part, and Crown Point Telephone Company, an Indiana Corporation, hereinafter called 'Crown Point', party of the second part,

Witnesseth: "That, whereas, the First-Chicago Corporation, an Illinois corporation, now owns all of the outstanding common capital stock of Northwestern Indiana Telephone Company, an Indiana corporation, hereinafter called 'Northwestern', and owns 678 shares of the first preferred stock of Northwestern and 652 shares of the second preferred stock of Northwestern, and may purchase additional shares of said first and second preferred stock of Northwestern; and

"Whereas the said First-Chicago Corporation is willing to sell all stock, both common and preferred, which it now owns or may hereafter acquire in Northwestern to the parties hereto, at the price hereinafter set forth,

"Now, therefore, the parties hereto agree as follows:

"I. Winona agrees to purchase from First-Chicago Corporation 900 shares of the common stock of Northwestern, 600 shares of the first preferred stock of Northwestern, and 500 shares of the second preferred stock of Northwestern, all for a total consideration of \$307,500; the stock acquired by Winona shall be held in escrow by the First Trust and Savings Bank of Chicago, Illinois, for the purpose of carrying out this agreement P.U.R.1928B.

and of surrender to Northwestern for cancellation upon delivery to Winona of the assets hereinafter described to be transferred to Winona.

"II. Crown Point agrees to purchase 600 shares of the common stock of Northwestern from the said First-Chicago Corporation for a consideration of \$202 per share, and further agrees to purchase from said First-Chicago Corporation all of the shares of the first preferred stock of Northwestern which said First-Chicago Corporation now owns or may hereafter acquire in addition of the 600 shares purchased by Winona, and all shares of the second preferred stock of Northwestern which the said First-Chicago Corporation now owns or may hereafter acquire in addition to the 500 shares purchased by Winona, at a price of \$103 per share for the first preferred and \$101 per share for the second preferred; if Crown Point does not acquire, under the terms hereof, all the remaining outstanding preferred stock of Northwestern, Crown Point shall cause Northwestern to call all outstanding preferred stock, and Crown Point shall advance a sufficient sum of money to Northwestern to redeem such stock.

"III. Winona agrees to surrender to Northwestern for cancellation, all of the common and preferred stock of Northwestern acquired by Winona hereunder, upon delivery, conveyance, and transfer to Winona of the telephone plant and property of Northwestern, including its real estate located within the territory outlined in blue on the map hereto attached, marked 'Exhibit A,' excepting from said property all toll poles, wires, and equipment constituting the Valparaiso-Hobart and Valparaiso-Chester-ton toll lines of Northwestern, and including therein certain specified interests in personal property of Northwestern as set forth in detail in Exhibit B hereto attached.

"IV. Crown Point agrees, after the transfer to Winona of the assets of Northwestern herein specified, and after the purchase by Crown Point or redemption by Northwestern of all the outstanding preferred stock of Northwestern, to cause Northwestern to liquidate its remaining assets to Crown Point, and to cause Northwestern to be dissolved as soon as may be thereafter.

"V. Crown Point agrees to assume by proper instruments all obligations and liabilities of Northwestern, excepting those here-P.U.R.1928B.

inafter specifically assumed by Winona, and including any and all contracts which Northwestern may now have with its corporate officers.

"VI. Winona agrees to assume liability for all real and personal property taxes on the property transferred to it subsequent to the date of transfer, that is, to pay the installments due November 1928 and thereafter, and to pay to Northwestern the present value of any prepaid insurance on said property, and to collect and transmit to Northwestern any unpaid bills of subscribers for telephone service in said territory rendered prior to said transfer, but without guarantee of any said accounts, provided that Northwestern will pay to Winona the amount of any prepayment of bills of subscribers for telephone service in said territory on the date of said transfer.

"VII. It is agreed that those parties receiving service from the Wheeler and Chesterton exchanges of Northwestern at locations just within the limits of the territory outlined in blue on Exhibit A, attached, shall continue to be served from such exchanges by Northwestern or Crown Point after the transfer of the properties hereinabove described, so long as such subscribers desire such service, but Crown Point agrees that it will not solicit nor accept other subscribers within the limits of said territory.

"It is agreed that those parties receiving service from the Valparaiso exchange at locations just without the limits of the territory outlined in blue on Exhibit A, attached, shall continue to be served from such exchange by Winona, after the transfer of properties hereinabove described, so long as such subscribers desire such service, but Winona agrees that it will not solicit nor accept other subscribers without the limits of said territory.

"IX. Upon the execution of this agreement, the parties hereto shall apply to the Public Service Commission of Indiana for its consent and authority for the parties hereto to proceed in the manner indicated by this contract, i. e., Winona to acquire said stock and transfer said stock for said assets; Crown Point to acquire said stock and liquidate to Crown Point all the remaining assets of Northwestern. Each party shall conduct its pro-P.U.R.1928B.

ceedings in its own name, or by joint petition, if such is advisable, and shall at its own expense make any appraisals of the respective properties to be secured hereunder which may be advisable or necessary as a part of said proceedings. If said Commission refuses its consent and approval of either or both of said petitions, or of said joint petition, this agreement shall become null and void and of no effect. If said Commission approves said petitions or said joint petition, the purchase of stock by Winona, and the transfer of assets to Winona shall be consummated simultaneously, and as expeditiously as possible.

"If, in the opinion of Crown Point, the consent of the Interstate Commerce Commission is necessary or advisable before it may carry out its obligations in paragraph II hereof, and acquire thereafter the assets of Northwestern not conveyed to Winona, Crown Point shall make said application to said Commission, with such assistance therein as Winona may be able to render without expense to it, provided, however, that Winona may acquire said property, if it so desires, prior to any action by Interstate Commerce Commission on said application.

"Crown Point agrees to employ counsel to prepare all corporate papers and documents incident to the consummation of this agreement, and to pay the expenses thereof, except such expenses as shall be incurred by Winona in employing counsel to examine any such papers and documents, or any expenses of Winona, including attorneys' fees, incurred in proceeding before the Public Service Commission of Indiana relative to this agreement or the consummation thereof.

"In the event that the consent of the Indiana Public Service Commission to this contract is not obtained within sixty days after the date hereof, then this contract shall, at the option of either party, become null and void, and each party shall be relieved of any liability hereunder.

"*This Agreement* shall inure to and be binding upon the respective successors and assigns of the parties hereto.

"*In Witness Whereof*, the parties hereto have hereunto caused these presents to be signed by their officers thereunto duly authorized.

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thorized, and have caused their corporate seals to be hereunto affixed and attested by their respective secretaries, the day and year first above written.

Winona Telephone Company,

By (signed) Sam Tomlinson,

Attest:

(Seal) (Signed) L. E. Daniel,
its secretary.

Crown Point Telephone Company,

By (Signed) L. C. Jones,
its vice-president.

Attest:

(Seal) (Signed) J. J. Carroll,
its secretary."

"Exhibit B.

"This exhibit is attached to and made a part of a certain contract between the Winona Telephone Company, herein called 'Winona,' and the Crown Point Telephone Company, herein called 'Crown Point,' dated this 23rd day of June, A. D. 1927, and specifies the interest in certain specified personal property acquired by Winona under the terms of the above described agreement, and the method of distribution thereof.

"1. It is agreed that Winona shall receive a 60 per cent interest in the following described property, the cost to the Northwestern and the present value thereof being that shown opposite each item:

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"Motor Equipment as Follows:

	Cost to Northwestern Company.	Present Value.
1 Chevrolet coupe bought June 1, 1926, used by collector and chief operator	\$747.50	
Depreciation 12 months at 2%	179.40	\$568.10
1 Ford bought December 17, 1926, used by plant supervisor	413.29	
Depreciation 6 months at 2%	49.59	363.70
1 Ford maintenance outfit bought January 10, 1927, (used) for	168.00	
Depreciation 5 months at 2%	16.80	151.20
1 4-wheel trailer bought September 30, 1926	314.00	
Depreciation	14.00	300.00
1 2½-ton service construction truck bought December 7, 1924:		
Truck	2,285.06	
Body	856.12	
Tarpaulin	50.00	
Total	\$3,191.18	
Depreciation 50%	1,595.59	
New spare tire and tube	150.00	1,745.59
Total		\$3,128.59

"General office equipment at Valparaiso as follows:

Kind of Equipment.	Date Purchased.	Purchase Price.	Present Value.
Metal file	1918	\$15.20	\$15.20
" "	1919	197.46	197.46
" "	1920	147.14	147.14
" "	1921	80.30	80.30
" "	1926	80.00	80.00
Royal Typewriter # 987544	9-1-26	\$520.10	\$520.10
" " 998417	9-1-26	92.25	75.00
L. C. Smith " 647098	3-8-27	92.25	75.00
Elliott Addressing Machine No. 12854 ..	1919	94.50	85.00
Burroughs Adding Machine No. 3-656736 ..	1925	365.00	200.00
Burroughs Adding Machine No. 3-526127 ..	1925	125.00	80.00
Safeguard Check Writer Model Y-217899 ..	2-15-26	125.00	80.00
		75.00	50.00
		\$1,489.10	\$1,165.10

"It is agreed that Winona shall by notice in writing specify any or all of above said property that it desires and that such property so specified shall be transferred to Winona, and Winona shall pay to Crown Point a sum equal to 40 per cent of the present value of such property so transferred to it. Crown Point shall pay Winona a sum equal to 60 per cent of the present value of any such property not taken by Winona.

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"2. It is agreed that Winona shall receive a 60 per cent interest in the following described property now in stock at Valparaiso:

- Cable and cable fittings
- Hardware
- Line wire of all kinds and fittings
- Strand
- Terminal boxes
- Glass
- Anchors and fittings
- Tools

"It is agreed that Crown Point shall cause an inventory and invoice to be made of said property as of a date to be determined as hereinafter specified. Such portion of said property as shall be indicated in writing by Winona shall be transferred to it and Winona shall pay to Crown Point a sum equal to 40 per cent of the value of said property, as shown by said inventory and invoice, transferred to it and Crown Point shall pay to Winona a sum equal to 60 per cent of the value of any such property not taken by Winona.

"3. It is agreed that 25 per cent of the magneto subsets and the magneto switchboard material now owned by the Northwestern Company and in stock at Valparaiso shall be transferred to Winona. The quantity of such magneto subsets and magneto switchboard material shall be determined by an inventory which Crown Point shall cause to be made as of a date to be determined as hereinafter specified.

"4. It is agreed that Winona shall take possession of all receivers, transmitters, and induction coils leased by Northwestern and use it within the territory outlined in blue on Exhibit 'A' attached to the above described contract, so far as it legally may do so under the terms of the contract of lease by which the Northwestern Company acquired and holds such instruments, and Winona agrees to comply with all terms and conditions in any such contracts of lease and to make all payments required under the terms of said lease and applicable to the instruments in its possession.

"The number of such instruments shall be determined by an P.U.R.1928B.

inventory which Crown Point shall cause to be made as of a date determined as hereinafter specified.

"5. It is agreed that all inventories required under the terms of this exhibit shall be made as of a date agreed upon by the parties hereto and subsequent to the approval of the Indiana Public Service Commission, and within five days thereafter. If the parties hereto cannot agree upon a date, the inventory shall be made as of the fifth day subsequent to the approval of the Indiana Public Service Commission.

"6. Common battery subsets and common battery switchboard material in stock at Valparaiso shall be transferred to Winona."

Pursuant to legal publication and notice to interested parties, a hearing was held on said petition in the rooms of the Commission, Indianapolis, Indiana, on October 6, 1927 at 9 A. M.

The petitioner submitted in evidence an appraisal of the property of the Northwestern Indiana Telephone Company as of July 1, 1927, made by J. R. Turner, Chief Appraisal Engineer of the Illinois Bell Telephone Company. Said appraisal gave the cost of reproduction of the property of said company as \$795,927, while the cost of reproduction less depreciation was given as \$545,672.

The chief engineer of the Public Service Commission, Earl L. Carter, submitted in evidence an appraisal of the property of the Northwestern Indiana Telephone Company, as follows:

Cost of reproduction	\$678,476
Cost of reproduction depreciated	491,179

[1] At this hearing, the Commissioner in charge made some inquiries of the president of the Northwestern Indiana Company, a witness called by the petitioners, concerning the ownership of the stock of the company which it is proposed in the petition to purchase. The testimony given by this witness was neither satisfactory nor in conformity with the allegations of the petition and exhibits attached thereto. Counsel for the petitioners objected to this questioning, but the Commission was of the opinion then, and is of the opinion now, that evidence as to the ownership of this stock is pertinent and material to this cause since the petition requests authority for the Winona Company and Crown Point Company to purchase said stock.

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Following this hearing the Commission took the matter under advisement and it was decided to make a thorough investigation of the question of the present ownership of the stock in view of the developments at the hearing.

Accordingly, further hearing was ordered before the Commission at Indianapolis, Indiana, on November 1, 1927. At this hearing representatives of and counsel for the Winona Company, Crown Point Company, Illinois Bell Telephone Company, and the First Chicago Corporation were present by request of the Commission.

[2] The evidence showed that the stock of the Northwestern Company had been purchased by the First Chicago Corporation of Chicago, Illinois, an Illinois Corporation, associated with a bank in Chicago, some time ago at the suggestion of the Illinois Bell Telephone Company. It was shown by the evidence that there was an agreement between the First Chicago Corporation and the Illinois Bell Telephone Company to the effect that the First Chicago Corporation should purchase this stock and the Illinois Bell Telephone Company, would, within a certain time, obtain a purchaser for such stock held by the First Chicago Corporation. Although the testimony was to the effect that there is no connection between the First Chicago Corporation and the Illinois Bell Telephone Company, it was admitted that the First Chicago Corporation had placed upon the board of directors of the Northwestern Company a representative of the Illinois Bell Company. The vice-president and general manager of the Illinois Bell Telephone Company, testifying concerning this matter, referred to this director as representing "our interest," and it appeared that, to some extent, at least, the Illinois Bell Telephone Company, through this director, is exerting a direct influence upon the management and conduct of the affairs of the Northwestern Company, although not admitting ownership of stock.

The testimony of H. O. Hale, vice-president and general manager of the Illinois Bell Company concerning this matter as shown by the record is as follows:

Q. You heard the testimony about "your" member on the board of directors of the Northwestern, did you not?

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A. Mr. L. C. Jones is a director in the Northwestern Indiana Telephone Company and Mr. L. C. Jones is our division plant superintendent in the suburban territory.

Q. He is your director on the board?

A. He represents our interest, yes.

Q. How were you able to put him on the board when you had no interest and had invested no money in this company?

A. By the courtesy of the First Corporation, I suppose.

The evidence indicated that at the time of the hearing, the board of directors of the Northwestern Indiana Telephone Company was composed of the following named persons:

E. E. Schmey, Evanston, Illinois; J. O. Sorg (Auditor of First Trust & Savings Bank) resides in state of Illinois; H. R. Ball, Valparaiso, Indiana; L. C. Jones, resides in Illinois; Mr. McGill, Valparaiso, Indiana (Witness did not know his initials).

It appears that Schmey and Sorg were placed on the Board of Directors by the First Chicago Corporation and Jones at the instance of the Illinois Bell Telephone Company through the "courtesy of the First Corporation." The stock of the Crown Point Telephone Company, one of the petitioners in this cause, is owned by the Illinois Bell Telephone Company. L. C. Jones is one of the signers of the petition in this cause as vice president of the Crown Point Telephone Company. The evidence concerning the Northwestern Indiana Telephone Company indicates that three members of the board of directors are bona fide residents and citizens of the state of Illinois.

Representatives of the city of Valparaiso appeared at this hearing and entered formal protest against the granting of the petition. As a result of these representations, the Commission ordered further hearing in this matter in the city of Valparaiso on November 17, 1927, in order to give the citizens of said city an opportunity to present evidence in this matter.

The hearing was held at the time and place above indicated.

A number of citizens of Valparaiso and other towns and communities where the Northwestern Indiana Telephone Company now operates, appeared at the hearing and entered protest against the granting of the petition. It appeared from the evidence that the citizens of this district are opposed to the proposal of

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the petitioners to dissolve the Northwestern Indiana Telephone Company and for this property to be divided by the Winona Telephone Company of Plymouth and the Crown Point Telephone Company. The evidence indicated that the objection of these patrons was based on their belief that Valparaiso and the surrounding territory is an integral part of the Calumet district of Indiana, and that no part of this telephone system should be acquired and directly connected with the Winona Telephone Company of Plymouth, but that the present service and management of the Northwestern Company is entirely satisfactory.

The petitioners presented evidence intended to show that in the event the petition is approved, no change of any consequence will be made in the character or quality of the service rendered and that it would in no wise be a disadvantage to Valparaiso or other communities thereabout to have the telephone exchange owned and operated by the Winona Company.

While numerous other matters were presented at the three hearings held in this cause, the essential points in the evidence have been reviewed above.

Section 95 of the Public Service Commission Act, as amended, contains the following provision:

"No public utility shall directly or indirectly acquire or become the owner of the property, stock, or bonds of any other public utility authorized to engage or engaged in the same or a similar business or operating or purporting to operate under a franchise from the same or any other municipality or under an indeterminate permit, unless authorized so to do by the Commission."

The Illinois Bell Telephone Company is a public utility engaged in the same or similar business in Indiana as the Northwestern Indiana Telephone Company and as such public utility is required to comply with the provisions of the Public Service Commission Act.

The circumstances surrounding the acquisition of the stock of the Northwestern Indiana Telephone Company by the First Chicago Corporation at the instance of the Illinois Bell Telephone Company leads this Commission to the conclusion that
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the spirit, if not the letter, of § 95 has not been followed in this transaction.

[3] Section 18 of the Public Service Commission Act, as amended, contains the following provision:

"The majority in number of the board of directors of each and every company or association organized under the laws of the state of Indiana and coming under the provisions of this act shall be bona fide residents and citizens of the state of Indiana while acting as such directors."

The Commission is of the opinion that neither the letter nor the spirit of this section of the Public Service Commission Act has been followed in connection with the selection of the present board of directors of the Northwestern Indiana Telephone Company in view of the fact that, according to the evidence, three of the five directors of said company are citizens and residents of the state of Illinois, at least one of such nonresident directors being a representative of the Illinois Bell Telephone Company on such Board.

[4] The proposal submitted to the Commission for consideration in this petition is, briefly: That the stock of the Northwestern Company be jointly purchased by the Winona Company and Crown Point Telephone Company and then for the Northwestern Company to be dissolved and the property to be divided between the Winona Company and the Crown Point Company, approximately 60 per cent of such property going to the Winona Company, and approximately 40 per cent of the property to the Crown Point Company.

The Commission caused its engineering department to make a report setting out in detail the proposed division of this property and also the air line mileage between the principal exchanges involved in view of the allegations of the petition to the effect that the proposed division is in the public interest and that the portions of the property to be acquired by the Winona Company and the Crown Point Company are adjacent to such properties. The report of the engineering department concerning these matters is as follows:

"The Winona Telephone Company is to receive that portion P.U.R.1928B.

of the telephone property situated in Porter, Morgan, Pleasant, Center, and Washington townships in Porter county, Indiana, and in addition thereto all telephone property in a strip two miles wide across the south ends of Liberty and Jackson townships. Also, all telephone property in the southeast portion of Union township described as follows: Beginning at a point on the south side of Union township approximately two and one-half miles west of the southeast corner of Union township and two and one-half miles east of the southwest corner of Union township, same being the middle point on the south line of Union township. From this middle point a line extending due north approximately three miles, thence east approximately .75 of a mile, thence north one mile, thence east approximately .6 of a mile, thence north 1 mile, thence east approximately .85 of a mile, thence north $\frac{1}{2}$ mile, thence east approximately .3 of a mile, thus coming to the township line between Union and Center townships in Porter county, at a point $\frac{1}{2}$ mile south of the north edge of Union township.

"The Crown Point Telephone Company, according to the terms of the contract, reserves any telephone lines and subscriber stations which are now being served from the Wheeler or Chesterton exchanges and which are immediately within the territories described above. Likewise, the Winona Telephone Company receives all of the telephone lines and subscriber stations, which, as of the date of the contract, are receiving service from the Valparaiso exchange, but which are located immediately outside of the territories described above.

"Following is a tabulation of the different telephone exchanges showing the approximate mileage in a direct line from center of town to center of town:

Crown Point—Valparaiso	16	miles
Crown Point—Hobart	9 $\frac{1}{2}$	"
Crown Point—Chesterton	20	"
Crown Point—Kouts	19	"
Crown Point—Wheeler	11 $\frac{1}{2}$	"
Valparaiso—Crown Point	16	"
Valparaiso—Hobart	10 $\frac{1}{2}$	"
Valparaiso—Chesterton	10	"
Valparaiso—Kouts	10 $\frac{1}{2}$	"
Valparaiso—Wheeler	7	"

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Plymouth—Valparaiso	40	"
Plymouth—Hobart	49½	"
Plymouth—Chesterton	42½	"
Plymouth—Kouts	36½	"
Plymouth—Wheeler	46	"
Plymouth—Crown Point	54	" "

This proposed division of the property appears to have been made entirely along arbitrary lines and without regard to public convenience and public necessity. No sound reasons, in the opinion of the Commission, were advanced in the evidence for the arbitrary division of the property proposed in the petition. It appears to the Commission that one interest obtained control of this telephone property and then another interest obtained a division of the property originally obtained by methods seriously questioned by this Commission. If the property of the Northwestern Indiana Telephone Company is to be divided with the consent of this Commission, it must be along lines indicating that public interest has been considered rather than along lines dictated alone by present or proposed owners of the stock of said company.

[5] While the mere fact that citizens of a number of the cities and towns affected have protested against the granting of this petition cannot be considered as controlling, the Commission is of the opinion that satisfactory public relations are necessary for the successful operation of utility property. Continuance of the present excellent public relations disclosed by the evidence appears to the Commission to be impossible under the division of the property as proposed in the petition. The attitude of the petitioners on this question is discussed in the testimony of an official of the Winona Company as shown by the record as follows:

Q. Have you made any investigation, as to the attitude of the citizens of Valparaiso and Kouts with reference to your purchasing, or your company purchasing, the two exchanges?

A. Not much.

Q. If it were shown to you that the citizens of this community, the greater portion of the citizens of this community, desire that Valparaiso and Kouts be left with the present hook-up, that is with the Crown Point Company, would you want to come in to this community with that feeling in the minds of the citizens?

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A. I see no reason not to.

The Commission feels that public interest must be considered as well as the interest of petitioners.

The Virginia supreme court of appeals, in its opinion in *Com. ex rel. Augusta County Farmers' Mut. Teleph. Co. v. Staunton Mut. Teleph. Co.* 134 Va. 291, P.U.R.1923B, 198, 203, 114 S. E. 600, recognized this principle and said:

"While it is true that the proceeding in the instant case is in the nature of a suit in chancery, yet in all such cases involving the regulation of public service corporations, the public as well as the nominal parties has an interest which the law requires the Commission to protect, to the end that the service rendered the public may be efficient and the best to be had under the circumstances."

In view of the evidence submitted, the Commission finds as follows:

1. That the acquisition of the stock of the Northwestern Indiana Telephone Company by the First Chicago Corporation at the suggestion of the Illinois Bell Telephone Company is contrary to the spirit, if not the letter, of § 95 of the Public Service Commission Act, as amended.

2. That the board of directors of the Northwestern Indiana Telephone Company, as now constituted, is not in conformity with the provisions of § 18 of the Public Service Commission Act.

3. That the proposed division of the property of the Northwestern Indiana Telephone Company is an arbitrary division made without regard to the service requirements of the territory involved.

4. That the proposed division of the property of the Northwestern Telephone Company along the lines proposed in the petition would militate against satisfactory public relations on the part of the petitioners.

The evidence discussed above shows, in the opinion of the Commission, that the petition in this cause should be denied, making it unnecessary to undertake a discussion of the appraisals submitted and the value of the property involved.

It is therefore *ordered* by the Public Service Commission of P.U.R.1923B.

Indiana, that the petition of the Northwestern Indiana Telephone Company to sell and of the Winona Telephone Company and Crown Point Telephone Company to purchase all of the capital stock and assets of said Northwestern Indiana Telephone Company, filed with this Commission on August 17, 1927, be, and the same is hereby denied.

It is *further ordered*, that petitioners shall pay into the treasury of the state, through the secretary of this Commission, the sum of \$140.87, expense incurred in the investigation of this cause, and the further sum of \$9.68, expense incurred in legal publication of notice of hearing in this cause, as required by law.

Singleton, McIntosh, Commissioners, concur; McCardle, Commissioner, dissents.

MARYLAND PUBLIC SERVICE COMMISSION.

RE UNITED RAILWAYS AND ELECTRIC COMPANY OF BALTIMORE.

[Case No. 533, Order No. 12630.]

Valuation — Methods of valuing easements — Street railway.

1. A method of valuing traction franchises previously used by the Commission in a rate proceeding by which it took the tax assessment figures on those parts of the company's rights of way which were private and in which the public had no interest as a basis for arriving at the value of all easements was admitted to be erroneous by the same body where all easements were thus inadvertently treated as if they were exclusive rights of way acquired for value from private owners, p. 742.

Valuation — Factors in ascertaining easement value — Street railway.

2. A street railway's "right to use" its easement strips, although having a value in addition to the actual use, is not so great as that of a private abutting property owner in view of the fact that the latter may use his premises for a vast number of lawful purposes whereas the company is restricted to the sole use of traction operation, p. 744.

Valuation — Easements — Duplication of value in car track intersections.

3. A tentative valuation by a street car company of part of its easement based on abutting property values containing admitted duplication of values at intersections of the easement strips and an addi-

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tion of 55 per cent to bring 1914 valuation up to 1924, was accepted solely because no other estimate of equal or greater authority was placed before the Commission, p. 750.

Valuation — Traction easements — Tax assessments — Comparisons.

4. An additional increase of 20 per cent on a valuation of street railway easements as of 1924 which had been brought up to date by adding 55 per cent to the tax assessment figures of 1914 was not permitted in view of the policy of the tax authorities of that city in assessing property at 100 per cent value and where there was a wide enough factor of tolerance in duplications of value due to track intersections to make up for any decrease from actual value in the tax figures, p. 751.

Valuation — Trolley pole and wire easements — Track width allowance.

5. A separate allowance for the value of street railway pole and wire easements was not permitted where the equipment itself had already been considered in reproducible property figures and where a 10-foot easement strip per single track was thought to be a sufficient allowance for the poles and wires as well as the track itself, p. 751.

Valuation — Traction easements — Highways crossing private rights of way.

6. Deducting highway crossings from private rights of way makes too small a difference in the total value of street railway easements to have a real effect in the valuation and such allowance, if necessary, can be made in another way without going into intricate calculations, p. 751.

Valuation — Traction easement — Relative interest of public and utility.

7. An apportionment of the relative interest of a street railway company and the public with relation to the total value of its easement strips was made on a basis of 25 per cent of the fee simple value of the strip to the company and 75 per cent to the public, p. 752.

[February 1, 1928.]

PROCEEDINGS before the Commission pursuant to a remand from the Court of Appeals for action as to the valuation of certain street railway easements and franchises; appropriate action taken in accordance with court opinion.

Appearances: Thomas J. Tingley, People's Counsel; Edwin G. Baetjer and Joseph C. France, for the United Railways & Electric Company of Baltimore.

West, Chairman: This case results from the decision of the court of appeals in remanding for further proceedings the action of this Commission in finding a value of the easements of the P.U.R.1928B.

United Railways & Electric Company of Baltimore, hereinafter referred to as the "Company."

By its Order No. 8240, entered on May 26, 1924, 15 Ann. Rep. Md. P. S. C. 120, P.U.R.1924D, 713, the Commission directed that the proceedings to establish the value of the property of the Company, which had been instituted by Order No. 1024, on December 30, 1912, but which had been allowed to lie dormant, be prosecuted to a conclusion. This investigation was completed and an opinion and order filed March 9, 1926, 17 Ann. Rep. Md. P. S. C. 74, P.U.R.1926C, 441, finding the fair value of the Company's property as of December 31, 1923, to be \$77,000,000, which sum included \$7,000,000 as the value of the Company's easements. For this element of its property the Company claimed a value of \$18,184,954. The then people's counsel, Clarence W. Miles, offered no testimony as to the value of the Company's easements. He contended that no value whatever ought to be allowed for them. The majority of the Commission, however, acting on the advice of Honorable Thomas H. Robinson, Attorney General, then legal adviser to the Commission, to the effect that he did not see how the Commission could avoid allowing a value for easements, and in view of the decisions of the court of appeals that the easements were actually an interest in land, felt compelled to allow a value for the Company's interest in the land occupied by its tracks. Commissioner Harper dissented as to the finding on easements, filing an opinion in which he held that no value whatever should be allowed for easements in the rate base.

The Company submitted three methods of finding the value of these easements which are explained in the Commission's opinion in the valuation case. The Commission declined to accept any of them, believing that none was proper, and that the value claimed as a result of the application of any one of them was excessive. It was, therefore, compelled to find a plan which it felt would alike be fair to the public and the Company.

It found that certain easements in Baltimore City were assessed for taxation purposes. These were in the new and old annexes, and they were assessed for taxation purposes because they were not subject to the park tax of 9 per cent on the gross P.U.R.1928B.

receipts of the Company which the city imposes. In the new annex the figure was \$12,500 per mile. In the old annex it was \$17,692 a mile. The Commission felt that these tax assessment figures represented the lowest value these easements possessed as an interest in land, without any consideration whatever of earning power. The figure per mile for the old annex was about 40 per cent higher than that for the new annex. The Commission, therefore, applied an increase of approximately 40 per cent to the assessed value of the old annex easements, reaching a figure of \$25,000 a mile which it fixed as the fair value of the easements within the boundaries of the city as they existed prior to the annexation of 1888.

People's counsel, adhering to his position that no allowance whatever ought to be made for easement value, appealed to the courts. He raised no particular objection to the *amount* allowed nor to the *method* by which the amount was reached, contending that the *principle of allowing any amount whatever* was wrong. The case went first to the circuit court of Baltimore City which sustained the Commission. In the case before the court it was argued that in finding a value for easements, the Commission was giving a value to an element of property the value of which was dependent upon its earning power.

Judge Frank, in discussing this point, said in effect that to allow a value created even in part by the earning capacity of the thing valued would be manifestly improper, for

"The objection to valuing an easement in a rate base in terms of earnings is self-evident. The greater the earnings, the larger the value of the easement. The greater the value of the easement, the larger the fair return that must be allowed upon such value."

He also said, however, that:

"The valuation of \$7,000,000 made by the Commission which is now the subject of attack, was reached without reference to the earning capacity of the easement so valued."

Mr. Miles appealed to the court of appeals, which, in an opinion in the case of *Miles v. Public Service Commission*, 151 Md. 337, P.U.R.1926D, 610, 135 Atl. 579, sustained the *principle* of allowing a value for easements but held that in using assess-
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ment values for fixing the value of the Company's easements the Commission actually had used values which contained the element of earning power. The court cited in support of this position the fact that the case of the Consolidated Gas Co. v. Baltimore, 101 Md. 541, 61 Atl. 532, definitely settles the fact that earning power is considered in establishing assessment values of easements.

It, therefore, remanded the case "without affirmance or reversal of the decree, for further proceedings in accordance with the opinion of this Court."

By agreement of counsel, the court below sent the case back to the Commission for rehearing.

When it fixed the value of the Company's easements at \$7,000, 000, the Commission, of course, was fully aware of the impropriety of including even the smallest part of an element of earning power in the value of an easement, or of any other piece of utility property, for rate-making purposes. It did not think it had done so, and if it did do so, this was by inadvertence. It was also, of course, familiar with the Consolidated Gas Company, case, *supra*, and with the fact that the court of appeals in that case had decided that the element of earning power should be taken into consideration in fixing the value of that Company's property for taxation purposes. It was aware also of the fact that a great deal of difficulty was experienced by the appeals tax court of Baltimore City in fixing the assessed value of the railway company's easements; that the railways' case had gone to the court of appeals; that the court of appeals had held that the park tax of 9 per cent of the Company's gross receipts was in part a tax on the easements subject to the park tax, and of the further fact that the value established for taxation purposes of such easements as are not subject to the park tax was the result of a compromise. The Commission was not aware that in that compromise figure the element of earning power was included.

Also, in fixing a value for county easements, abutting land values were used as a base, and that figure, the Commission feels, is not involved in the court of appeals' decision. For the easements in the new annex, the Commission had before it uncontradicted testimony of real estate experts, which gave a higher

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value of new annex easements based on adjacent land values than the value fixed for taxation purposes. Believing it would be justified in accepting the lower figure, it did so.

However, the court having decided that its method in using tax assessment figures was improper, the Commission has proceeded by another method to establish a value for the Company's easements in the new annex as well as in the old annex and the old city, which it feels will meet with the court's requirements. This method was developed at the rehearing which was had by the Commission and the whole case fully argued by counsel and briefs submitted.

[1] Before discussing the method followed at the rehearing, however, the Commission is compelled, in candor, to admit an error, other than that indicated by the Court, which it made in fixing the value of \$7,000,000 for the Company's easements. This was pointed out by Thomas J. Tingley, people's counsel, in the rehearing of the easement case. Its correction would result in a reduction in the value found by the Commission even using the tax assessment base.

In discussing the Company's methods of arriving at the values it claimed for its easements in the original valuation case, the Commission, having in mind easements generally, but particularly those in the old city and old annex, said:

" . . . the company has only an *interest* in that part of the public highways occupied by its tracks, and not an outright ownership, and it can only use that part of the highways occupied by its tracks, in common with other vehicles operating over the highways." (P.U.R.1926C, at p. 469.)

Nevertheless, in arriving at its value for the easements in the public highways, it took the tax assessment figures on those parts of the Company's rights of way that were not covered by the park tax, these figures being the only ones available. These particular sections were private rights of way in which the public has no interest. They were acquired by purchase, by condemnation, or by gift or exclusive grant or by all these methods. The public has no rights in them, except perhaps to cross them. The Commission, however, used the figures at which these *private* rights of way are assessed, as the basis for valuing *all* the rights P.U.R.1928B.

of way and easements of the Company, those in which the Company has only an interest as well as those which it owns outright, without making a reduction in the value of those easements in which the public has at least a right equal to that of the Company.

In pointing this out in his brief, Mr. Tingley says:

" . . . in the method of valuation thus employed, (by the Commission) it treated them, by inadvertence, as if they were exclusive rights of way acquired for value from private owners."

That is true.

In developing a plan for arriving at the value of the Company's easements for rate-making purposes, which will meet the objections of the court of appeals to the former plan, people's counsel and counsel for the Company have endeavored to determine what is the relative share or interest of the Company on the one hand, and the public on the other, in the land owned and used by them jointly. This plan has the approval of the Commission. The fact of the joint use of public easements was recognized and mentioned by the Commission in its earlier opinion. The working out of the plan, however, was beset by many difficulties and resulted in wide differences of opinion not only as to the application of the plan itself, but to the relative interests of the Company and the public in the city highways.

An effort was first made to determine the value of the property abutting upon the tracks of the Company; reducing all this property to lots of a depth of 150 feet; and applying this value of abutting property to the strip occupied by the railways in the bed of the street, in order to obtain the fee simple value of the easement strip. This done, the problem was then to determine the relative interests of the public and the Company in the strip. The Company claimed 50 per cent and 75 per cent as its interest, while the people's counsel allowed 10 per cent. The Company claimed an easement width for single track of 10 feet over the entire system, while people's counsel allowed 9.1 feet in the old city and old annex and 12 feet in the new annex and the counties.

The only testimony as to the value of abutting property was that furnished by the Company. It was based on the assessment P.U.R.192SB.

of 1914, and was originally made for the valuation proceedings under Order No. 1024, entered December 30, 1912. It covered the old city and the old annex and amounted to \$134,751,854. This amount was accepted by people's counsel, although he contended it was too close to the total land assessments in the old city and old annex to be correct. This phase of the situation was explained by counsel for the Company who said the values taken for land abutting on easements included street crossings, schools, churches, public squares, and parks and any other exempt property which did not appear on the tax rolls. It did develop, however, that in many instances the same property is valued twice, as in the case where car tracks cross. However, it was the only figure submitted.

It was also agreed between counsel that in order to get 1924 values for property valued in 1914, it would be necessary to add 55 per cent to 1914 assessments. This gives a value for the property abutting on the easements in the old city and old annex of \$208,865,374.

[2] The problem of finding the relative use by the public and by the Company of the easement strip was a complicated one, and almost entirely theoretical. There is no exact way of determining this. Also, the Company claims that "the right to use" is substantially of as great value as the actual use, which people's counsel denies. The Commission feels that "the right to use" is of some value in addition to the actual use, but what that value is, is a matter of judgment entirely, as is the actual use. There is no accurate measure for determining either. Certainly it is not as great as "the right to use" which the owner of abutting property has, for he may use his property for any or many of perhaps a hundred lawful purposes while the Company may use its easements and private rights of way for the single purpose of operating cars thereon. Therefore, if objection be made that the Commission has in any way taken into consideration "the use to which the property may be put," it has taken that single use as a measure for limiting, rather than increasing, the value of easements. However, the Commission has endeavored to value the easement strip simply as real estate.

There is no material difference between the people's counsel
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and the Company as to the mileage of the easement strip. The total number of miles of easements as found by people's counsel and accepted by the Company, is 366.653, divided as follows:

Old city	172.788 miles
Old annex	66.678 miles
New annex	88.649 miles
County	38.538 miles
Total	366.653 miles

Of these classifications, the valuation for the county stands as the Commission found it, undisturbed by the decision of the court of appeals, for the easement is exclusive, and the value found for it was not based upon tax assessment figures, but upon the appraised value of abutting real estate. The value of these 38.538 miles was found by the Commission to be \$368,662. The correct amount should have been \$368,038.

The value found by the Commission for the remaining 328.115 miles, consisting of the easements in the new and old annexes and in the old city, were based on tax assessment figures, and, under the decision of the court, a value for them must be found on a different basis, notwithstanding the contention of the Company's counsel that the value found for easements or rights of way in the new annex was lower than was shown by the uncontradicted testimony of the Company's real estate experts, who based their values for these easements on adjacent real estate values. As the Commission value *was* based on tax assessments, even though the Commission may have found a lower value than it otherwise might have found had it used adjacent land values, it must value them by another method.

The Company claims the value of its private rights of way and its public easements, on the basis of use, and right to use, to be \$10,321,290 on a 50 per cent use factor for public easements or \$14,613,568 on a 75 per cent use factor. To these figures it adds \$1,673,000 for pole and wire easements, making these values \$11,994,290 and \$16,286,568, respectively. The values are made up as follows:

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	Common Easements 50 per cent factor.	Common Easements 75 per cent factor.
County—		
38.5 miles—value as found by Commission ...	\$368,662	\$368,662
New annex—		
88.6 miles—former value found by Commission	1,131,512	1,131,512
Old annex—		
12.2 miles—exclusive	236,558	236,558
54.5 miles—common	528,378	792,566
Old city—		
172.8 miles—common	8,056,180	12,084,270
Total	\$10,321,290	\$14,613,568
Pole and wire easement	1,673,000	1,673,000
	\$11,994,290	\$16,286,568

The Company contends that so far as the new annex easements are concerned, they consist of 70.6 miles of exclusive easements with an actual, 100 per cent value, as of 1924, of \$1,055,682, and 18 miles of common easements, with a value based on a 50 per cent use factor of \$134,577, or with a 75 per cent use factor of \$201,866, making the total value \$1,190,259 or \$1,257,548, according to whether the 50 per cent or 75 per cent use factor is employed for the common easements. As already stated, the Company contends that these values are based on abutting property values, ascertained by real estate brokers, and that the tax assessment figures were used to reduce the real estate value, rather than increase it, and the Commission's value, \$1,131,512 for new annex easements, is not affected by the court's decision. Therefore, the Company adopts the Commission's figures of \$1,131,512 as being the value of the new annex easements of all kinds.

For the old annex, the Company claims for its 12.2 miles of exclusive easements a value of \$19,390 per mile or \$236,558, and for its 54.5 miles of common easements \$528,378 on a 50 per cent use basis, or \$792,566 on a 75 per cent use basis, making the totals \$764,936 or \$1,029,124, according to the use basis adopted.

The value per mile of the exclusive easements in the old annex is found by the Company in this way: The Company's witness, Mr. Giffen, testified (Record, p. 1797) that he had an-

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alysed the value of the property abutting on the Company's private rights of way in the old annex in 1914, and found that these rights of way amounted to 21.64 single track miles, and that the value of the property abutting thereon to the depth of 150 feet amounted to \$3,247,926. The Company, assuming an easement width of 10 feet, divided the \$3,247,926 by 15 to get the value of the easement strip. This amount was divided by the length of the strip, or 21.64 miles, and a value of \$10,006 per mile on the 1914 basis was reached. The Company adopted \$10,000 instead of \$10,006 as the value per mile. As it had been agreed that the assessed value of 1924 was 55 per cent greater than that of 1914, the figure \$10,000 was increased by 55 per cent, which resulted in a figure of \$15,500 per mile. Finally, on the contention that the 1924 assessed value of property represented only 80 per cent of its actual value, the Company divided the amount by 80 per cent and got a final value of \$19,390 per mile, which it claimed to be the fee simple value per mile of all its easements in the old annex.

In order to get the value per mile of the easements in the old city, Mr. Giffen testified (Record, p. 1804) that he started with a study of the abutting property values on all the Company's easements in the old city and the old annex which he made in 1914, and which amounted to \$134,751,854. The Company has 172.788 single track miles in the old city and 66.678 miles in the old annex, but instead of dividing by the sum of these, or 239.466, the Company first took the figure which Mr. Giffen arrived at for easements in the old annex, \$10,000 a mile, multiplied this by 15 to get the abutting property value per mile, and then by 66.678 and thereby got a value of \$10,000,000, which it claimed represented the 1914 assessment value of property in the old annex which abuts upon the easements of the Company. This figure was subtracted from the \$134,751,854, leaving \$124,751,854 as the 1914 assessment value of the abutting property in the old city.

By dividing this \$124,751,854 by 172.788 miles of single track in the old city, the Company obtained an abutting property value equal to \$720,000 a mile and, dividing this by 15, it got P.U.R.1928B.

a fee simple assessment value of the 10 foot easement strip equal to \$48,125 per mile, on 1914 assessment figures. Increasing this by 55 per cent, it got a 1924 value of \$74,594 a mile. Then, on the theory that the assessment value is only 80 per cent of *actual* value, the Company divided this figure by 80 per cent and got a figure of \$93,242 a mile which it asserts is the *actual* fee simple value of the easements in the old city.

People's counsel finds a value for the company's easements of \$2,113,000, and he arrives at his figure in this manner: For the 172.788 miles of easements in the old city he allows a fee simple value of \$34,000 per mile which he gets by dividing the assessed value of the property in the old city and old annex (1914 basis) by the mileage of the tracks in the old city and old annex. Allowing an easement width of 10 feet this would give a 1914 fee simple value of \$37,509 per mile. But he only allows a width of 9.1 feet, a reduction of 9 per cent, which gives him his value of \$34,000. He allows a 10 per cent use factor, which gives him \$3,400 a mile as the value of the Company's rights in the streets of the old city, or a total of \$585,000. He does not increase 1914 values to 1924 values by adding 55 per cent.

For the old annex and new annex, he separates the easements into three classes,—private rights of way, semi-private rights of way, and public easements. For private rights of way in the old annex he allows fee simple value, \$12,000 a mile, which he gets by using the basis of \$10,000 a mile, adopted by the Company, but allowing an easement strip of 12 feet. He uses this \$12,000 per single track mile throughout in determining old annex values. To the 54.527 miles of public easements in the old annex he applies the 10 per cent use factor and gets a total of \$65,000, or approximately \$1,200 a mile.

What the Company calls "exclusive easements" he calls "semi-private rights of way." That they are not actually exclusive, he contends, is shown by the fact that they are crossed at intervals by public highways. For these "semi-public" easements he allows the fee simple (1914) value, \$12,000, less the space taken up by crossings, for which space he allows a 10 per cent

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use factor, or $1/10$ of the fee simple value, and gets for the 11.443 miles a total value of \$130,000.

For the new annex he allows 1924 real estate values of \$15,000 per single track mile of easement, 12 feet wide. This gives him a total of \$43,500 for the 2.896 miles of private rights of way. For the public easements, taking the 10 per cent use factor, he gets a total of \$27,000 for the 17.996 miles; and for the "semi-private rights of way," consisting of 67.757 miles, he gets a total of \$960,000 by using the same method described in discussing "semi-private rights of way" in the old annex.

For the 38.538 miles of county easements, all of which he calls "semi-private" because they are crossed by public highways, he gets a total of \$294,000, or \$7,900 per mile. The Commission had in the earlier case allowed a total for these easements of \$9,550 per mile, or \$368,662. This valuation, accepted by the Commission, was made by brokers and experts on land values, and was based on adjacent land values. People's counsel took this figure for the 38.538 miles, added to it the 40 miles of private rights of way in the county, covered by Commission's Account 502, for which the Commission had allowed \$248,573, and which was not involved in the court of appeals' decision. He divided the total value by total miles (\$617,235 by 78.5) and got the average value of county easements and Account 502 at \$7,900 per mile. This figure multiplied by 38.5 miles gave \$304,150, the difference between that figure and the \$294,000 allowed by people's counsel being represented by the space taken out by public highway crossings. In the county he allows for five crossings to the mile, each 40 feet wide, while for the old and new annexes he allows eight of the same width per mile.

People's counsel's Exhibit No. 3 shows these values, found by him, as follows:
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Old City

Public easements—172.788 miles, 10% use factor, @ \$34,000 per single track mile \$585,000

Old Annex

Private rights of way—.708 miles @ \$12,000 per single track mile 8,500

Semi-private rights of way—

$$11.443 \text{ miles} \times \left[1 - \frac{9}{10} \left(\frac{8 \times 40}{5280} \right) \right]$$

@ \$12,000 per single track mile 130,000

Public Easements—54.527 miles, 10% use factor, @ \$12,000 per single track mile 65,000

New Annex

Private rights of way—2.896 miles @ \$15,000 per single track mile 43,500

Semi-private rights of way—

$$67.757 \text{ miles} \times \left[1 - \frac{9}{10} \left(\frac{8 \times 40}{5280} \right) \right]$$

@ \$15,000 per single track mile 960,000

Public easements—17.996 miles, 10% use factor, @ \$15,000 per single track mile 27,000

Counties

$$\text{Semi-public—} 38.538 \text{ miles} \times \left[1 - \frac{9}{10} \left(\frac{5 \times 40}{5280} \right) \right]$$

@ \$7,900 per single track mile 204,000

\$2,113,000

It will be noted that people's counsel makes no allowance for pole and feed wire easements for which the Company claims \$1,673,000. This was explained by the witness, Mr. Gildea, who said that the easement space allowed between tracks on streets where double tracks exist, was sufficient to compensate for the space occupied by poles and wires along side-walks.

[3] This Commission cannot accept either the values found or the method of arriving at those values, of either Company's counsel or the people's counsel. It accepts the figure of \$134,751,854 as representing the value of the property abutting upon the Company's easements in the old city and old annex in 1914. This figure, however, certainly contains some duplications of values, and it is the Commission's belief that these duplications occur at least in every instance where tracks on one street cross tracks on another. What these duplications amount to in dollars it is impossible to tell from the testimony or the data at P.U.R.1928B.

hand. It accepts the figure solely because it has no other of equal or greater authority. It also accepts the theory that in order to bring the 1914 figure up to 1924, the date of valuation, it is necessary to add 55 per cent to the 1914 figures.

[4] It is not willing, however, to concede that the 1924 value, arrived at by increasing the 1914 assessment figures by 55 per cent represents only 80 per cent of 1924 actual value, and that it ought to be further increased in order to show actual values. The Commission understands that it is the policy of the city authorities to assess property at 100 per cent of its value and believes they do so. Even if they did not, there would be a wide enough factor of tolerance in the duplications of value which occur where one car track crosses another at street intersections to make up for any decrease from actual value in assessment figures.

[5] Nor does the Commission feel that any separate allowance ought to be made for pole and wire easements. It made none in its previous valuation, feeling that the allowances made in the valuation figures of reproducible property under accounts 519 and 521 (Poles and Fixtures and Distribution System) of \$1,195,363 and \$3,549,645, respectively, were sufficiently large to include any easement value that might exist. The Company justifies its claim for a value of \$1,673,000 for its pole and wire easements in the old annex and old city, 239 miles at \$7,000 a mile, "wholly on the valuation of the gas and electric company's poles lines at \$7,000 per mile." (Company's Brief, page 32.) This amount was never allowed by this Commission. It is a compromise figure arrived at by the appeals tax court and the gas company for taxation purposes, and a figure reached by such method comes too close to the prohibition laid down in the court of appeals' decision for this Commission to allow it. Furthermore, the Commission feels that in using a 10-foot easement strip per single track, it has made sufficient allowance for poles and wires as well as the track itself.

[6] On the other hand, the Commission does not agree with some of the methods used by people's counsel in valuing easements, or the results arrived at by those methods. It believes that 10 feet, the figure used by the Company, more properly
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represents the width of the easement strip throughout the system than does the figures of 9.1 feet for the old city and old annex and 12 feet for the new annex and counties, used by people's counsel. Nor does it approve his method for arriving at the value of the easements in the old city and in the counties, which the Commission regards as mathematically unsound. Deducting highway crossings from private rights of way makes too small a difference in the total value to have any real effect in the valuation, but any allowance necessary to be made for this amount can be made in another way by the Commission without going into a series of intricate calculations.

[7] In spite of the practical impossibility of developing an accurate figure by which the ratio of use by the Company and the public in the easement strip may be determined, the Commission adopts the use factor in establishing the value of the Company's interest in the land which it occupies with its tracks. The Commission fully recognizes that it is indefinite, and that there are wide differences of opinion as to the actual use made of the strip by the public and the company; also as to how far the Company's "right to use" can extend against actual use by the public. In determining the extent of the Company's interest, the Commission must rely largely upon its own judgment, based on the *facts* that have been developed at the rehearing. The theories have not been particularly helpful.

It believes that an apportionment of a 25 per cent interest in the easement strip to the Company and a 75 per cent interest to the public is fair to both, and it, therefore, adopts 25 per cent of the fee simple value of the strip as the value of the Company's interest in the land occupied by its tracks where the rights of the Company are not exclusive, this fee simple value being determined by adjacent land values, assessment of 1914, brought up to January 1, 1924, values by increasing them 55 per cent.

The approximate values of all the easements of the Company, exclusive and nonexclusive, arrived at by the Commission as aforesaid, are as follows:

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Easements.

<i>Old City</i> , 172.788 miles @ \$48,125 per mile	\$8,315,422
<i>Old Annex</i> , 66.678 miles @ \$10,000 per mile	\$666,780
Less private rights of way .....	.708 miles
Less semi-private rights of way ..	11.443 "
12.151 " @ \$10,000 per mile	121,510
	545,270

<i>New Annex</i> , 88.649 miles @ \$9,647 per mile	\$855,197
Less private rights of way	2.896 miles
Less semi-private rights of way ..	67.757 "
70.653 " @ \$9,647 per mile	681,589
	173,608

Total, 1914 values \$9,034,300

Increasing this figure 55 per cent, the total value of the land included in the easements, based upon 1924 value, is \$14,003,165

Applying the use factor of 25 per cent to the value of the land, the approximate value of the easements is \$3,500,791

Private and Semi-Private Rights of Way in the Old Annex and New Annex (or Exclusive Easements):

Old Annex, 12.151 miles @ \$10,000 per mile \$121,510

New Annex, 70.653 miles @ 9,647 per mile 681,589

Total, 1914 values \$803,099

Increasing this figure 55 per cent, the total value of the private and semi-private rights of way in the old annex and new annex, based upon 1924 value, is 1,244,803

Semi-private Rights of Way (or Exclusive Easements) in the Counties:

38.538 miles @ \$9,550 per mile (1924 value) 368,038

Total approximate value of easements and private and semi-private rights of way \$5,113,632

After a careful consideration of all the factors which in its judgment go to determine or affect the value of the interest of the United Railways & Electric Company of Baltimore, in the land occupied by the tracks of its street railway system, the Commission finds the value of such interest to be \$5,000,000. As hereinbefore stated, the Commission has previously found that the value of the property of the Company, exclusive of easements, was \$70,000,000 as of December 31, 1923. The Commission, therefore, finds the total value of all property of the Company, including easements, to be \$75,000,000 as of December 31, 1923, P.U.R.1928B.

and an order will be passed accordingly modifying its Order No. 10072 entered herein on March 9, 1926, 17 Ann. Rep. Md. P. S. C. 74, P.U.R.1926C, 441.

Commissioner Harper concurs. Commissioner Purcell was not a member of the Commission at the time the case was heard and took no part in the deliberations or the decision of the Commission in this matter.

ORDER.

In accordance with the opinion of the Commission filed herein on the date hereof, which said opinion is hereby referred to and made a part hereof,

It is, this 1st day of February, in the year 1928, by the Public Service Commission of Maryland,

Ordered: That paragraph (1) of Order No. 10072 entered herein by the Commission on March 9, 1926, *supra*, be and it is hereby modified and amended to read as follows:

(1) That the fair value for rate-making purposes of the property of the United Railways & Electric Company of Baltimore on December 31, 1923, was \$75,000,000, and such valuation shall be and become final unless protest against the same shall be filed with the Commission within ten days from the date of this order, as provided by § 30 of the Public Service Commission Law.

And it is *further ordered* that except as hereinbefore modified, Order No. 10072 entered herein by the Commission on March 9, 1926, *supra*, shall be and remain in full force and effect.

And it is *further ordered* that a copy of this order and a copy of the opinion hereinbefore referred to and filed herewith be forthwith served upon the said the United Railways & Electric Company of Baltimore, and that the said Company, within ten days from the date of the service of such copy, advise this Commission in writing whether or not it will accept and abide by the same.

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MISSOURI PUBLIC SERVICE COMMISSION.

RE ST. JOSEPH GAS COMPANY.

[Case No. 5153.]

Return — Necessity for valuation — Gas utility — Expenses.

1. Valuation of utility property is necessary even when a company offers to forego its return so as to fix rates on the theory that various items of expense should be allocated to the respective classes of customers, taking into account their demands, since such expenses as depreciation, retirement, taxes, and maintenance vary with the size and value of the property, p. 760.

Rates — Gas — Allocation of customer cost.

2. A rate structure theory claiming to give consideration to the rates charged the large consumers in order to increase sales and then proceeding to justify the proposed increase to 57 per cent of the small consumers by the use of an allocation of costs made upon the theory that all consumers may be taken as one class, the smaller class, is inconsistent, p. 767.

Rates — Gas utility — Costs incurred by varied distribution.

3. To allocate the costs incurred by a gas system serving varied classes of consumers as though the consumers were all of one class, the smaller class, is liable to produce unfair rates to the smaller consumers, p. 767.

Rates — Gas — Factors to be considered.

An analysis of the elements to be considered in the composition of a scientific rate structure equitably distributing the cost of operation and at the same time tending to produce greater volume of business, p. 759.

[January 5, 1928.]

FINAL order of Commission making permanent a suspension of the effective date of proposed rate charges for gas service, temporarily suspended by prior order.

By the **Commission**: On February 25, 1927, the Commission received from the St. Joseph Gas Company a letter with which was inclosed a schedule of rates that the company proposed to charge for gas service furnished in the city of St. Joseph, Missouri. The effective date requested was April 1, 1927. Notice of the filing of the new schedule was given the city counselor of that city and on March 4, 1927, said city filed its motion asking that the schedule be suspended and that the Commission make an investigation as to the legality and fair-

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ness of said rates. The schedule was duly suspended and an investigation instituted.

Two hearings were held at St. Joseph, the first on May 11, 1927, and the second on June 21, 1927. A third and final hearing was held at Jefferson City on September 12, 1927, at which time the case was concluded and the applicant given ten days after receipt of transcript of evidence for filing its brief and the city ten days thereafter in which to file its reply. The city's brief has been filed and to this the company has made reply. The case now comes before us for decision.

The rates now charged for gas service by the St. Joseph Gas Company, hereinafter called the gas company, are as follows:

Manufactured Gas * (Coal or carburetted water gas)

For the first 50,000 cubic feet of gas consumed per month through one meter or bank of meters:

Illuminating gas	\$1.65	per	1,000	cubic feet
Fuel gas	1.65	"	1,000	" "
Power gas	1.65	"	1,000	" "

For the second 50,000 cubic feet of gas consumed per month through one meter or bank of meters:

Illuminating gas	\$1.50	per	1,000	cubic feet
Fuel gas	1.50	"	1,000	" "
Power gas	1.50	"	1,000	" "

For the third 50,000 cubic feet of gas consumed per month through one meter or bank of meters:

Illuminating gas	\$1.25	per	1,000	cubic feet
Fuel gas	1.25	"	1,000	" "
Power gas	1.25	"	1,000	" "

For the fourth 50,000 cubic feet of gas consumed per month through one meter or bank of meters:

Illuminating gas	\$1.00	per	1,000	cubic feet
Fuel gas	1.00	"	1,000	" "
Power gas	1.00	"	1,000	" "

For the next 300,000 cubic feet of gas consumed per month through one meter or bank of meters:

Illuminating gas	\$.90	per	1,000	cubic feet
Fuel gas .....	.90	"	1,000	" "
Power gas .....	.90	"	1,000	" "

For all gas consumed per month through one meter or bank of meters in excess of 500,000 cubic feet:

Illuminating gas	\$.80	per	1,000	cubic feet
Fuel gas .....	.80	"	1,000	" "
Power gas .....	.80	"	1,000	" "

An additional 5 cents per M cubic feet will be added to amounts of monthly bills rendered under this schedule if such bills are not paid on or before ten days after the date upon which said bills are rendered.

Each meter installed is subject to a minimum bill of 75 cents per month. P.U.R.1928B.

The above rates have been in effect since April 26, 1926. The rates prior to the above were the same in the first three blocks, but for all gas used beyond 150,000 cubic feet per month the rate was \$1 per thousand cubic feet. The maximum rate of \$1.65 per thousand cubic feet as now charged was fixed by the Commission in Case No. 3073, which case was brought before it upon a complaint filed by the city against a service charge the applicant was then charging in addition to the charge made for the gas used.

The schedule filed and now proposed by the gas company is entitled its P. S. C. Mo. No. 2, 8th Revised Sheet No. 1, cancelling P. S. C. Mo. No. 2, 7th Revised Sheet No. 1, and reads as follows:

Manufactured Gas

(Coal or carburetted water gas)

The following schedule is to apply to all gas consumed by one customer at one location for every purpose whether measured by one meter or a bank of meters:

For all bills of 200 cubic feet per month or less 75 cents net per bill

For all bills of more than 200 cubic feet per month:

First	200 cu. ft. per month	.....	\$8.75 net per bill
Next	1,800 cu. ft. per month	.....	1.45 net per 1,000 cu. ft.
Next	18,000 cu. ft. per month	.....	1.35 net per 1,000 cu. ft.
Next	30,000 cu. ft. per month	.....	1.25 net per 1,000 cu. ft.
Next	100,000 cu. ft. per month	.....	1.15 net per 1,000 cu. ft.
Next	150,000 cu. ft. per month	.....	1.05 net per 1,000 cu. ft.
Next	200,000 cu. ft. per month	.....	.90 net per 1,000 cu. ft.
Excess over	500,000 cu. ft. per month	.....	.80 net per 1,000 cu. ft.

An additional 5 cents per 1,000 cubic feet will be added to amounts of monthly bills rendered under this schedule if such bills are not paid on or before ten days after the date upon which said bills are rendered.

Each meter installed is subject to a minimum bill of 75 cents per month.

On May 9th, following the filing of the schedule in February, the gas company wrote the Commission inclosing in the letter a petition bearing the signatures of 258 of its consumers requesting that the proposed rates be approved by the Commission and made effective at the earliest practicable date. The letter of transmittal states that of the number approached only 59 refused to sign the petition. At the final hearing the city filed as its Exhibit No. 3, the signatures of 208 consumers who are protesting against the proposed rates as being discriminatory against the small consumers. So it appears there are a large

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number of consumers who are in favor of the proposed schedule of rates and likewise those who are opposed to it.

In the opening statement made by counsel for the gas company at the first hearing held in this case, he states among other things, that the gas company for the year 1925 had sufficient revenues to pay its operating expenses, to set aside a depreciation reserve, to pay interest charges, and to provide \$25,000 additional for return; and that in 1926 the applicant had \$20,000 for return and that it was evident the company must have an increased revenue in some way in order to exist. He also stated that the gas company considered a schedule of higher rates of the present form prohibitive and that after a study of the problem of how to increase its revenue it has worked out and filed, the schedule of rates now proposed. The gas company claims to offer this schedule in order to make a lower rate to the consumers who can probably be induced to increase their consumption, admitting that the only objection that can be made to the proposed schedule by anyone is that the revised rates raise the charges to the small consumers. The gas company further states that by the use of this rate it will take a reduction of \$25,000 in its annual revenue.

As stated above, the gas company made during the year 1925 a net amount of \$25,000 above operating expenses and a fixed amount for depreciation and interest charges. Though the proposed schedule of rates would, if applied to 1925 sales, produce a gross revenue of \$25,000 less than was actually received, the gas company hopes by its adoption to build up its gross business sufficiently to make a better return than it now has. It appears from the testimony that the result of the application of the proposed schedule will be such that the rates to those consumers who used over 2200 cubic feet of gas per month will enjoy a reduction while those whose use is between 200 cubic feet and 2200 cubic feet will be required to pay a higher rate for the service. The number of consumers using less than 2200 cubic feet of gas amounts to 57 per cent of the total number but said consumers use 27 per cent of the gas sold. Evidence was submitted to show that the proposed rates would

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have produced a total gross revenue received from the larger class of consumers during 1925 approximately \$38,000 less and that the revenue from the small users aforementioned would have been \$13,000 greater. In other words, the gas company believes it can increase its gas sales to those consumers who use 2200 cubic feet of gas or more per month by lowering the rate and desires to put into effect a schedule of rates designed for that purpose, but also designed to increase the charge made to its customers whose use is below 2200 cubic feet. It claims that those consumers who use less than 2200 cubic feet of gas per month are not paying under the present rates, the cost of furnishing the service and a large part of its testimony is offered in proof of these claims, the gas company also submitted evidence to show that the small consumer will not pay enough to meet the expense of serving him even under the proposed rates.

In support of the form of rates proposed, the gas company offers certain exhibits and testimony concerning recent activities of the American Gas Association. This association is composed of members of various gas companies and others interested in the gas business throughout the country. One of its activities of late, appears to be along the line of rate investigation and forms of rate schedules for gas companies. The present gas company filed for its Exhibit No. 27, Appendix 1 of the 1926 rate structure committee report of the American Gas Association presented to that association at its 1926 convention and in filing it, states the rate submitted in this case is based on that report.

In that report the Committee reviews to some extent the history of the gas business stating that the first use of gas was entirely for lighting purposes, and it was then considered that only a simple form of rates was required to equitably charge for the service. The report then goes on to show that as the use of gas increased, the form of rate schedules was given study so that now with the use of gas for industrial purposes, house heating, cooking, some lighting and for consumers who use very little gas, called convenience consumers, it is necessary to so design the rates and charges that one class of consumers will not receive service for which one or more of the other classes of

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consumers may partially pay. The report analyzes the expense incurred in furnishing gas service into four basic groups.

- I. Production-demand costs
- II. Distribution-demand costs.
- III. Customer costs
- IV. Commodity costs.

Production-demand costs are defined as all expenses that depend upon or vary with the size or capacity of the production plant. Distribution-demand includes all expenses that depend upon or vary with the size or capacity of the distribution system. Commodity costs include all expenses that depend upon or vary with the volume of gas produced and customer costs include all expenses of meter reading, keeping of accounts, adjustment of appliances, interest and depreciation on that part of the distribution which is governed by the number of customers served rather than by their hourly demand, that is the expenses that are not involved in any way with the quantity of gas taken or the way in which it is taken.

The report then shows how the committee would allocate each item of expense as kept under the Uniform Classification of Accounts for Gas Utilities as recommended by the National Association of Railway and Utility Commissioners. Analyses are then made of example accounts and a discussion of different forms of rate schedules made to show the application of the theory to those forms and the effect. This much has been said of that report because the present gas company has used it as a basis for its request to apply the rates it is now proposing.

[1] The gas company claims the value of its property is not an important question to be considered in this proceeding. However, it offers numerous exhibits to show the present value of the property used in furnishing the service. Said claim is made on the theory that as the gas company is willing to give up all of its return for an opportunity to try the proposed rates, an allocation of property expenses to the different classes of consumers is not now necessary. If the gas company were willing, and could, give up all items of expense caused by the existence of the property we could accept its claim that the value of the P.U.R.1928B.

property is not needed in fixing the rates under the theory proposed. There are such expenses as depreciation, retirement expense, taxes and maintenance that vary both as to the size and to the value of the property. And since the rates proposed are on the theory that the various items of expense should be allocated to the respective classes of customers, taking into account their demands, it appears the value of the property cannot be overlooked.

By the second sheet of its Exhibit No. 8, the gas company shows a reproduction cost value of its property which it claims to find by starting with the Commission's valuation made January 24, 1922 (12 Mo. P. S. C. R. 142) as a basis and adding all additions and betterments to April 30, 1927, and deducting the reproduction cost of certain property, nearly \$119,000, which is not in use at this time and has not been charged off the books. It will be noted that the property appraised March 1, 1915, and still in service April 30, 1927, has been given an increased reproduction cost value of $33\frac{1}{3}$ per cent above the 1915 values in order to arrive at a present reproduction cost. The exhibit is shown below. [Exhibit omitted.]

By the third sheet of its Exhibit No. 8, the gas company shows a value which it claims as the value of the property used and useful as of April 30, 1927, based on the Commission's reproduction cost of March 1, 1915, brought down to date, listing the various property accounts as shown in the reproduction cost as made by the Commission's engineers in 1915, adding $33\frac{1}{3}$ per cent thereto and the additions made to those accountants since March 1, 1915 up to April 30, 1927. The values as set forth on that sheet are as shown below.

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ST. JOSEPH GAS COMPANY

Value of Property Used and Useful April 30, 1927

Based on Commission's Reproduction Cost March 1, 1915.

Property Appraised March 1, 1915.

	Reproduction Cost.	Overhead.	Total.
1. Land	\$105,446.00	\$17,925.00	\$123,771.00
2. Buildings	75,435.00	9,807.00	85,242.00
3. Plant apparatus	293,008.00		
4. Mains	511,064.00		
5. Services	135,209.00		
6. Meter connections	110,604.00		
7. Piping	115,879.00		
8. Paving disturbed	55,605.00		
9. General equipment	6,617.00		
Total 3 to 9	\$1,127,986.00	180,478.00	1,308,464.00

Increase in reproduction cost 33½%	\$1,517,077.00
Reproduction cost April 30, 1927	\$2,022,769.00
Additions March 1, 1915 to April 30, 1927.	

	Cost.
Buildings	\$49,750.27
Plant apparatus	202,977.05
Mains	141,978.82
Services	3,088.61
Meters and connections	17,205.02
Piping	21,472.05
General equipment	24,012.26
Interest during construction	4,759.06
	465,243.14

Materials and supplies April 30, 1927	\$2,488,012.14
Working capital—½ operating expenses for 1926	118,615.05
	53,145.00

Going value	\$2,659,772.19
	250,000.00
	\$2,909,772.19

Retirement reserve April 30, 1927	\$467,625.27
Utility equipment reserves April 30, 1927	6,990.95
	\$474,616.22
Proportion reserve not earned	210,476.48
	\$264,139.74
Property abandoned not charged off	118,921.40
	145,218.34
Reproduction cost April 30, 1927	\$2,764,553.85

Another method of arriving at the value of the property is shown on page 5 of the gas company's Exhibit No. 8. The value claimed in this exhibit is of property still used and useful as of April 30, 1927, based on the Commission's reproduction cost P.U.R.1928B.

less depreciation, as of March 1, 1915, increased 33½ per cent for a present reproduction cost value with additions from March 1, 1915 to April 30, 1927, not including any item not now used and useful, but including materials and supplies now on hand, working capital and going value. That exhibit is as shown below.

ST. JOSEPH GAS COMPANY

Value of Property Used and Useful April 30, 1927

Based on Commission's Reproduction Cost Less Depreciation of March 1, 1915.

Property Appraised March 1, 1915.

	Reproduction Cost Less Depreciation.	Commission's Overhead.	Total.
1. Land	\$105,446.00	\$17,925.00	\$123,771.00
2. Buildings	58,354.00	7,586.00	65,940.00
3. Plant apparatus	268,587.00		
4. Street mains	428,813.00		
5. Services	122,032.00		
6. Meters and connections	99,417.00		
7. Piping	13,496.00		
8. Paving disturbed	47,264.00		
9. General equipment	5,625.00		

Total 3 to 9 \$985,234.00 157,637.00 \$1,142,871.00

Increase in reproduction cost 33½% \$1,332,182.00
444,061.00

Reproduction cost less depreciation April 30, 1927 \$1,776,243.00

Additions March 1, 1915 to April 30, 1927.

	Cost.	
Buildings	\$49,750.27	
Plant apparatus	202,977.05	
Mains	141,978.82	
Services	3,088.61	
Meters	17,203.02	
Piping	21,472.05	
General equipment	24,012.26	
Interest during construction	4,759.06	465,243.14

\$2,241,486.14

Materials and supplies April 30, 1927 \$118,615.05
Working capital—½ operating expenses 1926 53,145.00
Going value 250,000.00 421,760.05

Reproduction cost less depreciation April 30, 1927 \$2,663,246.19

Another exhibit, marked the gas company's Exhibit No. S-A was offered to show a value of the property as of April 30, 1927, by taking an appraisal as of June 30, 1924, made by the Gas Improvement Company to which appraisal the additions since P.U.R.1928B.

June 30, 1924 to April 30, 1927, have been added. The value as found in that exhibit is shown below. [Exhibit omitted.]

In its report of January 24, 1922, in Case No. 3073, 12 Mo. P. S. C. R. 142, this Commission found as a fair present value as of that date for the gas company's property, a value of \$2,100,000. By taking the items then considered by the Commission and bringing the value down to April 30, 1927, using the information shown on the gas company's Exhibit No. 8, Sheet No. 2, we get the following value:

	Cost of Reproduction	Cost of Reproduction Less Depreciation.
Commission engineer's appraisal (3 Mo. P. S. C. 414) plus additions to plant Aug. 31, 1921	\$1,988,050.00	\$1,707,676.00
Additions Sep. 1, 1921 to Apr. 30, 1927	210,930.00	210,930.00
Materials and supplies	118,615.05	118,615.95
Cash working capital $\frac{1}{2}$ annual operating expenses	35,430.00	35,430.00
	<hr/>	<hr/>
	\$2,353,025.05	\$2,072,651.05
Intangibles		250,000.00
		<hr/>
		\$2,322,651.05

The above sum shows a present value a quarter of a million dollars greater than that of 1922 and some \$324,000 less than the lowest estimate, given by the gas company in the methods used by it and shown above. If the return on the property were the only item of property expense to be taken into account it would not be necessary to give the value further thought at this time, as admitted by the gas company, but as it has been indicated above, we believe consideration should be given to the value in the application of the theory offered by the gas company in justification of the schedule now proposed.

In the report made by the rate structure committee filed by the gas company as its Exhibit No. 27, there is shown an analysis of fixed capital of a certain gas property allocated to the four groups. The report states that in the property and analysis taken as an example no reference has been made to the influence on the rate of different types or classes of consumption, because it was assumed in the example the customers used all used the service in approximately the same way, the claim being made that the assumption is fair P.C.R.1928B.

for a gas company in a community where gas is used for domestic purposes only. The results of the analyses for property allocation are that 23.82 per cent should be charged to production demand, 37.41 per cent to distribution demand, and 38.77 per cent to customer's charge.

Now, if a part of the consumers served by the above system taken as an example were industrial consumers and other larger ones than domestic consumers it is very evident that the property allocated to demand would be greater and the customer group would be a smaller per cent of the total cost. On its Exhibit 14-A, the gas company allocated \$1,303,862.89 of a total of \$2,663,245.69 claimed as a value of its property to the customer group. That is 49 per cent of the total. The same reasoning is applicable to allocation of the operating expenses as shown by the gas company on its Exhibit No. 14. That exhibit shows an allocation of \$235,573.69 of a total of \$637,158.09 of its 1926 operating expenses to customer charge, or approximately 37 per cent, whereas the allocation made in the gas committee report was 30.48 per cent. The results appear to be inconsistent with the theory. We are of the opinion that these percentages should be less, thereby lessening the customer charge.

The report of the rate structure committee after illustrating the application of the theory to a gas system serving consumers of one class goes on to state that it should be understood that in many situations the total load is made up of several classes of business, each with its own peculiar load characteristic and that a careful study will disclose the fact that the varied use of the equipment by these different classes has an important influence on the structure of the rates. The gas company has come to the Commission asking permission to shift a part of its expenses from one or more classes of consumers to another class, which constitutes 57 per cent of its total number, in order to try to get the larger consumers to use more gas and consequently to increase its revenues. We are of the opinion that the gas company should have gone farther into the theory it advanced and submitted the evidence the rate structure committee indicates necessary. The city contends that the gas company has allocated too much of its operating expenses to customer charge. The gas com-
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pany's Exhibit No. 14 showing its 1926 operating expenses allocated to the various groups is set out below. Exhibit No. 14.

ST. JOSEPH GAS COMPANY

Summary of Analysis of 1926 Operating Expenses Apportioned to Various Classes of Costs in Accordance with Standard Analysis of Rate Structure Committee of American Gas Association.

	Total.	Commodity.	Pro- duction Demand.	Distri- bution Demand.	Customer.
Production	\$202,372.25	\$171,417.39	\$29,092.10	\$1,862.76	
Transmission and distribution ..	53,703.32	3,571.72		5,905.96	\$44,225.63
Commercial	23,338.63				23,338.63
New business ..	18,310.01	5,493.00	3,515.50	2,527.00	6,774.51
General and mis- cellaneous ...	46,028.65	9,205.73	9,205.73	9,205.73	18,411.46
Uncollectible bills	1,400.00	280.00	280.00	280.00	560.00
Total operating expenses	\$345,152.86	\$189,967.85	\$42,003.33	\$19,781.45	\$93,310.23
Local taxes	46,803.21		12,590.87	11,515.64	22,696.70
Federal income taxes	3,202.02	960.60	614.78	441.88	1,184.76
Retirement ex- pense	30,000.00		7,055.00	7,320.00	15,625.00
Total operating deductions ...	\$425,158.09	\$190,928.45	\$62,353.98	\$39,058.97	\$132,816.69
Return 8% on \$2,650,000 ...	212,000.00		60,165.00	49,078.00	102,757.00
Total	\$637,158.09	\$190,928.45	\$122,518.98	\$88,136.97	\$235,573.69
	Cu. Ft.	Cu. Ft. 24 Hr.	Cu. Ft. 1 Hr.		
Customers and demands	329,960,300	1,446,000	156,000		10,150
Costs per unit per annum ...	\$8.5786 per M cu. ft.	\$8.47 per 100 cu. ft. per 24 hour.	\$56.50 per 100 cu. ft. per hour.	\$23.21 per customer.	

The gas company's Exhibit No. 14-B shows the details of the accounts given above. One of the items under transmission and distribution account is a sub account, maintenance of mains, showing \$10,329.71 charged to customer account and \$2,446.57 charged to distribution demand. This raises the question that can best be asked by an illustration. Take for example a main two blocks long that is laid to serve one consumer. Would the maintenance charged on that main be allocated in the same manner as it would, if the main were required to serve the same total load but was used by 50 consumers? It appears to the Commission that there is danger of making the customer cost too great P.U.R.1928B.

unless the demands of the various classes of customers are given more consideration.

The gas company's Exhibit No. 12 shows a classification of its consumers by giving the number of consumers who use from 0 to 200 cubic feet of gas per month, those who use from 300 to 1200 and from 1300 to 2200 and so on, but this does not give sufficient information for proper classification as we understand the theory upon which the company rests its case. There may be consumers using small meters, consuming more gas in a month than other consumers whose demands require larger meters, services, and mains. No evidence is submitted showing a classification of the consumers according to their demands.

[2, 3] Our conclusion in this matter is that the gas company is inconsistent in its application of the rate structure theory advanced in that it claims that it must give consideration to the rates charged the large consumers in order to increase sales and then proceeds to justify the proposed increase to 57 per cent of its small consumers by the use of an allocation of costs made upon the theory that all consumers may be taken as one class, the smaller class. The principles in general of allocating the costs on the theory give in Exhibit No. 27 are sound and any form of schedule built upon those principles should provide fair and nondiscriminating rates, but to allocate the costs incurred by a gas system serving varied classes of consumers as though the consumers were all of one class, the smaller class, is liable to produce unfair rates to the smaller consumers.

It is very apparent the applicant gas company desires to do something to build up its sales and claims to be willing to forego all return at present if it is permitted to try out the schedule of rates filed in this case. The Commission does not want to be understood as attempting to stand in the way of the development of this property. It is to the interest of both the city and the utility for the utility to grow under fair rates. The evidence shows that the company has made improvements that reduce the cost of producing the gas and the company claims to have made the improvements necessary for the best operation of the system. The full application of the theory used in support of P.U.R.1928B.

the proposed rates may show that the rates are just and fair, but until such proof is given, the rates will be denied.

Brown, Chairman, Ing, Calfee, Porter, Commissioners, concur; Hutchison, Commissioner, absent.

COLORADO SUPREME COURT.

WESTERN TRANSPORTATION COMPANY

v.

PEOPLE.

[No. 11905.]

(— Colo. —, 261 Pac. 1.)

Interstate commerce — Jurisdiction of state over local business of interstate busses.

1. An injunction issued by a court on an order of the Commission denying a certificate to a motor transportation company to do intrastate business was held not intended to enjoin such utility from engaging in interstate commerce and it was further held that had such prohibition been intended, then to that extent the decree of the court would be inoperative, p. 769.

Interstate commerce — Power of state to regulate local activity of interstate busses.

2. A prohibition against interstate motor carriers also incidentally conducting a purely intrastate business without securing a license from the proper state authorities therefor, is not a prohibition upon interstate commerce but a lawful regulation by the state of its highways, p. 771.

[October 31, 1927.]

En banc. Suit by state against bus company for injunction to restrain operations in violation of order of Public Utilities Commission denying certificate of convenience and necessity; injunction granted, affirmed on appeal.

Appearances: M. W. Spaulding, of Denver, for plaintiff in error; William L. Boatright, Attorney General, and Ralph L. Carr, Assistant Attorney General, for the people.

Sheafor, J.: The defendant in error, hereinafter referred to as the people, or the plaintiff, brought this suit against the plain-P.U.R.1928B.

tiff in error, the Western Transportation Company hereinafter designated as the company, or defendant, asking for the issuance of a temporary injunction restraining and prohibiting defendant from operating any motor vehicle affording a means of transportation similar to that ordinarily afforded by railroads, by indiscriminately accepting, carrying, laying down, discharging, and delivering freight and express, between fixed points and over established routes for hire within the state of Colorado, and as a common carrier therein, without first having obtained a certificate of public convenience and necessity from the Public Utilities Commission of this state, and that such injunction be made permanent.

The court found for the plaintiff and ordered that a temporary injunction issued as prayed for, which was later made permanent. Defendant prosecutes error and applies for a super-seedeas.

[1] On June 24, 1926, defendant filed with the Public Utilities Commission an application for a certificate of convenience and necessity in order that it might transact the business of transporting freight and express within the state of Colorado. The application for the certificate was denied by the Commission on March 7, 1927.

Upon the trial before the court, Alva W. Dornon testified that he had been general manager of the defendant since it was incorporated, and that the company was then, at the time of the trial, engaged in the operation of motor trucks for the transportation of freight and express between various towns in the state of Colorado; also, that the company accepted shipments of freight and express from the public generally for transportation between points in Colorado. He also testified that they filed their application with the Public Utilities Commission for license, which was refused, and that the company was still continuing just the same as they were before the application had been filed. This evidence, together with admissions made by the defendant in its answer, shows, we think, that defendant was engaged in intrastate business within the state of Colorado.

The defendant alleged, as one of its defenses, that it was engaged in interstate commerce. The evidence on behalf of de-

defendant tended to show that it was engaged in interstate transportation of freight and express. The defendant's contention is that to prohibit defendant from operating in this state would be to interfere with interstate commerce, and deprive the company of rights that are guaranteed to it by the 14th Amendment to the Federal Constitution; that it would be a violation of the Constitution of the state of Colorado, and also a violation of the Federal aid statutes (Highway Act [23 USCA §§ 1-53]); also, that the Public Utilities Commission has no jurisdiction over the company's operations, and that in so far as the Colorado statutes would permit any prohibition of the company's operations, they are unconstitutional.

From the foregoing, I think we may assume that defendant was, at the time of the institution of this suit, engaged in both interstate and intrastate commerce, and was not engaged exclusively in one or the other. The defendant insists, however, that the evidence shows it was engaged exclusively in interstate commerce, but the able and ingenuous argument of defendant's counsel has not convinced us. The foregoing evidence, admissions, and the application do not sustain him. His argument is that the application for certificate does not show whether it was for intrastate or interstate commerce. But counsel's further argument is to the effect that the company could not be required, by the state, to obtain a certificate of convenience and necessity to do an interstate business. It seems, then, that it logically follows that the company did not apply for a certificate to do an interstate, but did apply for one to do an intrastate business.

We do not think, as contended by counsel, that the injunctive orders were intended to, nor do they, enjoin defendant from engaging in interstate commerce, and that they should not be so construed, but if so, then to that extent the decree of the court is inoperative.

It will be observed that plaintiff was not asking the court to restrain interstate shipments, but merely to prohibit the company from acting as a common carrier in the state of Colorado for the transportation of freight and express within the state P.U.R.1928B.

without the certificate of public convenience and necessity required by the statute.

The evidence does not show the extent of the interstate shipments as compared with intrastate business transacted by the company.

[2] The plaintiff cites *Interstate Busses Corp. v. Holyoke Street R. Co.* 273 U. S. 45, 71 L. ed. 530, P.U.R.1927B, 46, 47 Sup. Ct. Rep. 298, decided January 3, 1927, and other cases.

We think the case of *Clark v. Poor*, decided by the Supreme Court of the United States May 31, 1927, 274 U. S. 554, 71 L. ed. 1199, P.U.R.1927D, 346, 47 Sup. Ct. Rep. 702, opinion by Mr. Justice Brandeis, is decisive of the instant case. In that case, it appears that, in 1923, Ohio passed a transportation act (Gen. Code, §§ 614-84 to 614-102) which provided that a motor transportation company desiring to operate within the state should apply to the Public Utilities Commission for a certificate so to do and should not begin to operate without first obtaining it. Also, that the company should, at the time of the issuance of the certificate and annually thereafter, pay a tax graduated according to the number and capacity of the vehicles used. The appellants Clark and others operated, as common carriers, a motor truck line between Aurora, Indiana, and Cincinnati, Ohio, exclusively in interstate commerce. They ignored the provisions of the act and operated without making application for a certificate or paying the tax provided for. They brought suit against the Commission to enjoin it from enforcing, as against them, the provisions of the act. The case was heard in the district court before three judges. It further appeared in that case that the Ohio act called the certificate one of "public convenience and necessity." Plaintiffs' bill was dismissed in the district court, and they appealed. Justice Brandeis said:

"The plaintiffs claim that, as applied to them, the act violates the commerce clause of the Federal Constitution. They insist that, as they are engaged exclusively in interstate commerce, they are not subject to regulation by the state; that it is without power to require that before using its highways they apply for and obtain a certificate; and that it is also without power."

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er to impose, in addition to the annual license fee demanded of all persons using automobiles on the highways, a tax upon them, under § 614-94, for the maintenance and repair of the highways and for the administration and enforcement of the laws governing the use of the same. The contrary is settled. The highways are public property. Users of them, although engaged exclusively in interstate commerce, are subject to regulation by the state to insure safety and convenience and the conservation of the highways. *Morris v. Doby* (No. 372) 274 U. S. 135, 71 L. ed. 966, 47 Sup. Ct. Rep. 548, decided April 18, 1927. Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use. . . . The plaintiffs did not apply for a certificate or offer to pay the taxes. They refused or failed to do so, . . . because of their belief that, being engaged exclusively in interstate commerce, they could not be required to apply for a certificate or to pay the tax. Their claim was unfounded. Moreover, the act made each section and part thereof independent and declared that 'the holding of any section or part thereof to be void or ineffective for any cause shall not affect any other section or part thereof.' . . . And the act also provided that it should apply to interstate commerce only in so far as such regulation was permitted by the Federal Constitution."

The decree dismissing the bill was affirmed.

Our own statute (§ 2976, C. L. 1921) provides that:

"Neither this act nor any provision thereof, except when specifically so stated, shall apply or be construed to apply to commerce with foreign nations or commerce among the several states of this Union, except in so far as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress."

The defendant further contends that, while the state may regulate the use of its highways, it cannot prohibit interstate commerce. But the plaintiff does not seek in this case to prohibit interstate commerce. If the state cannot enjoin a company from transacting an intrastate business when it is doing so without P.U.R.1923B.

having obtained the certificate required by law, then it is utterly powerless to regulate its highways at all.

In *Interstate Busses Corp. v. Holyoke Street R. Co. supra*, at p. 49 of P.U.R.1927B, Mr. Justice Butler says:

"The burden is upon appellant to show that enforcement of the act operates to prejudice interstate carriage of passengers. The stipulated facts do not so indicate. The threatened enforcement is to prevent appellant from carrying intrastate passengers without license over that part of its route which is parallel to the street railway. Its right to use the highways between Springfield and Hartford is not in controversy."

So here, the evidence does not show that the enforcement of the act in question operates to prejudice interstate transportation of freight and express. As already stated, the plaintiff is not attempting to prevent the company from engaging in interstate commerce, but to prevent the company from engaging in intrastate business without the required license.

Mr. Justice Butler further said, in the case cited, that:

"Appellant may not evade the act by the mere linking of its intrastate transportation to its interstate or by the unnecessary transportation of both classes by means of the same instrumentalities and employees."

We deem it unnecessary to pursue the subject further. We think the contentions of defendant have been fully answered in *Interstate Busses Corp. v. Holyoke Street R. Co. supra*; *Morris v. Duby, supra*; and *Clark v. Poor, supra*.

Supersedeas denied, and judgment affirmed.

Affirmed.

On Petition for Rehearing.

The evidence set forth in the petition for rehearing does not establish that the enforcement of the act in question operates to prejudice interstate transportation of freight and express, nor that its enforcement would impose unreasonable burdens upon interstate commerce. The burden is upon defendant to show that. Defendant's chief reliance is placed upon *Buck v. Kuykendall*, 267 U. S. 307, 69 L. ed. 623, P.U.R.1925C, 483, 45 Sup. P.U.R.1928B.

Ct. Rep. 324, 38 A.L.R. 286. I call attention to this paragraph appearing in the opinion in that case:

"With the increase in number and size of the vehicles used upon a highway, both the danger and the wear and tear grow. To exclude unnecessary vehicles—particularly the large ones commonly used by carriers for hire—promotes both safety and economy. State regulation of that character is valid even as applied to interstate commerce, in the absence of legislation by Congress which deals specifically with the subject."

The Kuykendall Case seems to be in entire harmony with Clark v. Poor, *supra*.

Rehearing denied November 21, 1927.

ARIZONA CORPORATION COMMISSION.

RE ELECTRIC AND WATER CORPORATIONS.

[General Order No. 110-E.]

Water powers — Jurisdiction of the Commission — Safeguarding of public rights — Certificate.

1. The bestowing of legal rights and privileges and franchises authorizing the operation by public service corporations of natural water powers situate within the state, by means of certificates of public convenience and necessity, which may not be obtained elsewhere or otherwise, is the only manner in which the Commission, in the exercise of its full powers to safeguard the rights of the state and fully protect its people, may impose the restrictions and limitations contemplated by the State Constitution and the pursuant statute, p. 775.

Water powers — Power of the state over natural resources — Federal government.

2. The full and absolute power and control over the establishment, development, and operation of all the water power and hydroelectrical power in the state devolves upon the state subject only to the limited sovereign powers conferred upon the Federal Government under the Federal Constitution, p. 777.

Water powers — Jurisdiction of state to impose conditions — Hydroelectric development.

3. The state possesses the primary right to fix and impose such terms and conditions upon corporations developing hydroelectric power as will encourage the same within the state and at the same time protect the rights of the people from exploitation, p. 777.

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Certificates of convenience and necessity — Hydroelectric power development.

4. All water and electric corporations exercising or contemplating the exercise of any right or privilege under any franchise or permit relating to the development of hydroelectric energy within the state of Arizona without having obtained a certificate were ordered forthwith to file with the Commission applications for such certificates as provided by the Constitution and the rules of the Commission, p. 778.

[January 4, 1928.]

ORDER of the Arizona Corporation Commission requiring all corporations engaged in hydroelectric development to obtain a certificate of convenience and necessity before engaging in such activity within the state of Arizona.

By the **Commission**: [1] *Whereas* the Arizona Corporation Commission was created by § 1 of Article XV of the State Constitution and its powers and duties are defined in the subsequent sections of that article subject only to the powers of the legislative branch of the state government to enlarge the powers and extend the duties and to prescribe rules and regulations to govern proceedings instituted by and before the Arizona Corporation Commission;

Whereas among the many powers and duties conferred or imposed by the Constitution upon the Arizona Corporation Commission is the regulation and supervision of public service corporations among which are included all corporations other than municipal engaged in producing or distributing or in furnishing electricity for light, fuel, or power and/or in furnishing water for irrigation, fire protection, or other public purposes, and

Whereas all electric transmission or pipe line corporations for the transportation of electricity and/or water are further declared to be common carriers, and

Whereas the legislative branch of the government subsequently enacted the Public Service Corporation Act, Chapter 90, of the Session Laws of Arizona, 1912, in which it is provided that:

“(q) The term ‘electric plant,’ when used in this act, includes all real estate, fixtures, and personal property owned, controlled, operated, or managed, in connection with or to facilitate the P.U.R.1928B.

production, generation, transmission, delivery, or furnishing of electricity for light, heat, or power, and all conduits, ducts, or other devices, materials, apparatus, or property, for containing, holding, or carrying conductors used or to be used for the transmission of electricity for light, heat, or power.

"(r) The term 'electrical corporation,' when used in this act, includes every corporation or person, their lessees, trustees, receivers or trustees appointed by any court, whatsoever, owning, controlling, operating, or managing, any electric plant for compensation within this state, except where electricity is generated on or distributed by the producer through private property alone solely for his own use or the use of his tenants and not for sale to others.

"(w) The term 'water system,' when used in this act, includes all reservoirs, tunnels, shafts, dams, dykes, headgates, pipes, flumes, canals, structures; and appliances, and all other real estate, fixtures, and personal property, owned, controlled, operated, or managed in connection with or to facilitate the diversion, development, storage, supply, distributions, sale, furnishing, carriage, apportionment, or measurement, or water for power, fire protection, irrigation, reclamation or manufacturing, or for municipal, domestic or other beneficial use.

"(x) The term 'water corporation,' when used in this act, includes every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating, or managing any water system for compensation within this state."

Whereas in these definitions are set out and specifically designated certain public service corporations which, although included in the more generic terms of the constitutional provisions, have heretofore in a measure been free from regulation by the Commission both as a matter of expediency justified by public policy and also because the Commission did not deem that the public convenience and necessity were endangered thereby.

Whereas the state is now confronted by questions of policy involving the development of water power, particularly in connection with the appropriation and use of water from navigable and unnavigable streams wholly or partially within the state
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of Arizona, the Commission at this time is impressed with the necessity of exercising its full powers in connection therewith so that the rights of the state and of its people may be fully protected and safeguarded by the restrictions and limitations contemplated by the Constitution and the statutes which may only be done by bestowing through the certificate of convenience and necessity of the Commission the legal rights and privileges and franchises authorizing the operation of public service corporations which may not be obtained otherwise or elsewhere; since in exercising its powers of determination, the Commission may not only in its discretion, impose conditions precedent to the granting of its certificate but at all times possesses the reserved right to amend, modify, and repeal its rules and regulations governing the operation of public service corporations subsequent to the issuance of said certificate.

[2] This phase of public service corporation regulation is particularly of interest to the Commission since the full and absolute power and control over the establishment, development, and operation of all the water power and hydroelectrical power in the state devolves upon the state subject only to the limited sovereign powers conferred upon the Federal Government under the Constitution of the United States which are not to be confused with those proprietary rights which may have heretofore or may hereafter be acquired by the Federal Government.

In the exercise of the authority bestowed upon it, the Commission desires to extend the fullest measure of co-operation to the Federal Power Commission without, however, in any manner, seeking to delegate its own exclusive authority to consent to and approve of the plans and specifications under which such development of water or electric power is made and the terms and conditions under which such public service corporations may exercise any right or privilege or franchise or permit heretofore or hereafter granted.

[3] *Whereas* the sovereign power of the state possesses the primary right to fix and impose such terms and conditions upon public service corporations making and developing water or hydroelectric power development in a manner which will encourage the development of the water power in the state and at the P.U.R.1928B.

same time safeguard the rights of the people and prevent exploitation, and

[4] *Whereas* a number of water corporations and electrical corporations as defined by the Public Service Corporation Act and included within the Constitutional provisions have refrained from or neglected or refused to make application to this Commission for the certificate of convenience and necessity, and certain of said firms or corporations have heretofore operated as public service corporations and others are proceeding in a manner which manifests their disposition to operate as public service corporations without the proper certificate of convenience and necessity from this Commission.

Now, therefore, it is *ordered* that each and every such water corporation and/or electrical corporation now exercising or which contemplates the exercise of any right or privilege under any franchise or permit heretofore granted without having obtained from the Arizona Corporation Commission a certificate that the public convenience and necessity require the exercise of such right or privilege, immediately and forthwith file with the Commission, its application for such certificate as provided by law by the Constitutional provisions and the rules and regulations of the Commission.

Note.—Waters and water courses.

Allegations that a utility petitioning for a Commission finding that public use and benefit require the erection of a dam and electric plant does not have the consent of landowners so to do and that the erection of the dam is prohibited by statute, are immaterial in the proceeding before the Commission. *Dummer Power Co. v. International Paper Co.* 81 N. H. 213, 124 Atl. 556, Feb. 6, 1924.

A Commission finding that the erection of a dam for generating power will be of public use and benefit should not be disturbed when it is conceded that the object for which the utility proposes to employ the power is a public use and there is no evidence leading the court to the conclusion that the Commission finding was erroneous. *Ibid.*

In *Re Lake Sunapee Power Co.* D-848, May 13, 1924, Chairman Gunnison, of the New Hampshire Commission, in dismissing a petition for permission to erect a dam, said: "The evidence in this case P.U.R.1928B.

is to the effect that the petitioner owns the land on which the proposed dam is to be constructed and has acquired the right to flow all of the land that will be covered by water due to the erection of the dam. Under these conditions the petitioner may construct its dam without first having the Public Service Commission issue an order that its construction will be for the public use and benefit. See *Dummer Power Co. v. International Paper Co.* 81 N. H. 213, 124 Atl. 556. The supreme court in this case says: 'A landowner may build such dam as he pleases, consistent with the public safety (Chap. 47, Laws 1913; Chap. 178, Laws 1917) upon his own land and flow his own land, and that of others who consent, without aid from the statute.'

In *Re U. S. Bobbin & Shuttle Co.* D-865, Order No. 1518, May 13, 1924, Commissioner Worthen of the New Hampshire Commission, in authorizing an increase in the height of a dam, said: "Whenever water powers are developed economically, or those already developed are economically improved, the public is benefited thereby. In the first place, fuel consumption is reduced and as the supply of coal, which is the fuel most in use for generating power, is limited, it is important that it be conserved as much as possible for future generations. In the second place, the consuming public is directly benefited by having the manufactured article produced at a lower cost, which should lower the price at which it can be bought in the market. In the third place, the increase in business, due to more economical operating costs, advantageously affects the community where the industry is located."

In *Re Wisconsin Hydro-Electric Co.* WP-227, Aug. 12, 1925, the Wisconsin Commission, after citing § 31.18 (3) of the statute, said: "The statutes contemplate that this Commission should safeguard public rights in navigable waters from unwarranted acts of dam owners, and for this reason dam operators are required to lay before the Commission any proposed reconstruction scheme which may remotely affect such public rights. Had the company applied to the Commission under § 31.24, statutes, for permission to lower the level of the lake, the Commission would not have granted the right to lower such level to the extent it did in this case, although the Commission would have permitted the lowering of the level substantially below the minimum level fixed by this order. The Commission believes that the company acted in good faith and in ignorance of the requirements of the statute above set forth. Section 31.24, however, requires the Commission to report to the Governor every violation of Chap. 31, and accordingly a copy of this decision will be forwarded to the Governor for such action as he may deem proper."

The conservation and development of water resources for domestic P.U.R.1928B.

use, irrigation, and power and light under the Porto Rico Water Power Act has been held to be for common public uses in a suit in which the validity of the act was attacked. An injunction restraining the enforcement of the provisions of the act was reversed by the Circuit Court of Appeals, First Circuit in *Gallardo v. Porto Rico R. Light & P. Co.* No. 2058, 18 F. (2d) 918, April 11, 1927.

* **COLORADO PUBLIC UTILITIES COMMISSION.**

**BOARD OF COUNTY COMMISSIONERS OF WELD
COUNTY**

v.

J. E. CLAYBURG.

[Case No. 331, Decision No. 1551.]

Public utilities — Private carrier contracts — Number of customers — Motor carrier.

1. The number of parties with which alleged private hauling contracts are made, considering the number of shippers and population of the particular community, determines in a great measure, the status of the carrier, p. 782.

Public utilities — Private motor carrier — Tests of status.

2. A complaint against a private motor carrier was dismissed where he expressly stipulated that he did not hold himself out for public carriage and did not indiscriminately accept and transport freight or express, and designated specifically with whom he had an agreement, refusing to transport for any other, p. 782.

[January 7, 1928.]

COMPLAINT by county commissioners against alleged illegal motor carrier operations; complaint dismissed.

Appearances: J. G. Scott, Denver, for complainant; Clay R. Apple, Greeley, for defendant.

By the **Commission**: This is a complaint by the Board of County Commissioners of the county of Weld, state of Colorado, complaining against the defendant that he owns, controls, and operates one motor vehicle, using the same in serving the public in the business of transporting property for compensation over the public highways between Denver, Colorado, and Greeley, Colorado, and intermediate points, and indiscriminately accepts, P.U.R.1928B.

discharges, and lays down freight and express and holds himself out for such purposes for the public generally without having ever obtained a certificate of public convenience and necessity from this Commission, and without having paid the tax provided for in § 7, Chapter 134, Session Laws 1927, and an order to cease and desist is prayed for.

The defendant filed an answer to this complaint, denying the allegations thereof, and alleging that he is under contract with five persons in Greeley to transport to and from Denver such merchandise as said persons need.

This matter was set down for hearing at the court house, Greeley, Colorado, on December 15, 1927. At that time the parties hereto entered into the following stipulation:

"It is stipulated and agreed by and between the parties hereto by their respective attorneys that the facts in the above entitled matter are as follows, to wit:

"That defendant now owns, controls, operates, and manages and for about two years last past has owned, controlled, operated, and managed one motor vehicle, an International 1½ ton speed wagon, using the same in the carrying of property for compensation between Denver and Greeley, Colorado, for only five persons, or firms, or corporations in the city of Greeley, Colorado, as follows:

Consumers Oil Company (retail and wholesale petroleum products); Irving Fallek (Batteries and battery repairs); W-F Hardware Company (Retail hardware); Greeley Co-operative Company (Feed and grain); Boise-Payette Lumber Company (Nails and hardware).

"That defendant hauls property for the above five persons or firms and no other except as hereafter stated, and has refused and does now refuse to haul for any other (excepting an occasional farmer), and does not advertise for other business.

"That such transportation is conducted for said persons and firms under verbal contract with such persons; that the method of operation by defendant is upon specific orders received from such persons to obtain and carry for them and to them certain specific merchandise; that he does not operate regular schedules; that the defendant does hauling for Hickman-Lumbeck, whole-P.U.R.1928B.

sale grocery company, of groceries from Greeley to Fort Morgan and intermediate points, upon specific orders from said Hickman-Lumbeck Grocery Company, making a trip every Thursday for said company.

"That defendant does not have a certificate of public convenience and necessity from the Public Utilities Commission of the state of Colorado, and has never applied for one.

"That defendant does not pay any taxes as provided by § 7, Chapter 134 of Session Laws of Colorado, 1927.

"That Greeley is a city of about 15,000 population and has approximately 400 mercantile establishments of various kinds; that said city of Greeley is situated 52 miles north and east of Denver on a paved highway."

Section 1 (d) of Chapter 134 of the Session Laws of 1927 defines a motor vehicle carrier as follows:

"The term 'motor vehicle carrier' when used in this act means and includes every corporation, person, firm, association of persons, lessee, trustee, receiver or trustee appointed by any court, owning, controlling, operating, or managing any motor vehicle used in serving the public in the business of transporting persons or property for compensation over any public highway between fixed points or over established routes, or otherwise, who indiscriminately accept, discharge, and lay down either passengers, freight, or express, or who hold themselves out for such purpose by advertising or otherwise."

[1, 2] The stipulation of facts herein, in our opinion, does not bring such a motor vehicle operation within the meaning of the above quoted section as a common carrier. The Commission assumes, however, that the agreements entered into by Mr. Clayburg are made in good faith. If, for instance, he should make contracts such as described in the stipulation with other merchants in Greeley, increasing the number thereof as opportunity presents itself and changing around considerably and with some frequency his service to other merchants, it would be an indication that he is attempting to evade the law and using the alleged contracts as a subterfuge to circumvent the law. In other words, in the opinion of the Commission, there must be some perma-

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nency to such contracts, otherwise he would become a common carrier.

Our supreme court, in the case of *Davis v. People ex rel. Public Utilities Commission*, 79 Colo. 642, P.U.R.1926E, 635, 247 Pac. 801, said that mere schemes to evade the law once their true character is established are impotent for the purpose intended, and that courts sweep them aside as so much rubbish.

The number of parties with which such contracts are entered into, depending somewhat upon the number of shippers and population of the particular community, in a great measure determines the status of a carrier. The defendant in the instant case expressly stipulates that he does not hold himself out to the public to transport freight and express, and does not indiscriminately accept and transport freight and express, and designated specifically in the stipulation with whom he has an agreement to transport and that he refuses to transport for any other. Under these circumstances the Commission is of the opinion that the complaint herein should be dismissed for want of jurisdiction.

COLORADO PUBLIC UTILITIES COMMISSION.

RE FRANK PLESS AND WALTER DAVIS.

[Application No. 987, Decision No. 1553.]

Monopoly and competition — Burden of proof to show inadequacy of existing service — Minor service defects.

1. A strong showing of inadequacy of existing service should be made by an applicant for a rival certificate of convenience and necessity before a separate operation over an existing carrier route will be authorized in view of the fact that the Commission has power to regulate service and has always stood ready to hear any complaints and to make such orders as will remedy reasonably a minor defective service, p. 785.

Certificates of convenience and necessity — Effect of certificate upon illegal operation.

2. The failure of the Commission to deny a certificate because of prior illegal operation does not legalize an operation made unlawful by statute, p. 785.

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Certificate of convenience and necessity — Illegal operation in good faith no bar — Busses.

3. A certificate was granted to an applicant admittedly operating without authority prior to hearing in view of the general ignorance of motor carriers throughout the state concerning the law or the rules and regulations adopted by the Commission pursuant to the law governing their operations and in further view of the need of the public. the duration of actual operation, and the good faith of the operator, p. 785.

[January 7, 1928.]

APPLICATION of motor utility operators for certificate of convenience and necessity to function as a firm; granted with restrictions.

Appearances: Harry S. Class, Denver, attorney, for applicant; D. A. Maloney, Denver, attorney, for the Northern Transportation Company; E. G. Knowles, Denver, attorney, for the Union Pacific Railroad Company; John Q. Dier, Denver, attorney, for the Colorado & Southern Railway Company; A. S. Hab-enicht, Denver, for the American Railway Express Company; D. Edgar Wilson, Denver, attorney, for the Colorado Motor Way, Inc.

By the **Commission**: On November 15, 1927, there was filed the application of Frank Pless and Walter Davis doing business under the firm name and style of Pless and Davis for a certificate of public convenience and necessity authorizing the operation of a motor vehicle system for the transportation of freight, milk, and cream between Denver, Colorado, and La Salle, Colorado, and those intermediate points of Ione and others intermediate to Ione and La Salle. Answers and protests were filed by the Northern Transportation Company, Colorado Motor Way, Inc., Union Pacific Railroad Company, and the American Railway Express Company. The case was heard in the Court House in Greeley on December 16, 1927.

The evidence shows that for over three years the applicants have been operating between La Salle and Denver, hauling merchandise for the merchants from Denver and milk and cream from the farmers in the vicinities of La Salle, Peckham, Gilcrest, Platteville, and Ione to Denver. They gather the milk and cream not only at the points named but at the doors of

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the farmers and deliver the same on the dock of an ice-cream manufacturer in Denver. In rendering this service they not only save the farmers the trouble and expense of carting their cream and milk to a railroad station and the drayage from the depot in Denver but effect a considerable saving in time.

[1] Quite a number of merchants in the towns named testified that the service of the applicants in hauling merchandise for them is a convenience and necessity. A few instances were pointed out by different witnesses of unsatisfactory service by the Northern Transportation Company, a certificate holder which operates through each and all of the points named. They showed a desire to be served by a system which has its headquarters nearer to them and which gives somewhat closer contact. The headquarters of these applicants is in La Salle, which is eight miles from Greeley and is considerably further from Platteville and Ione. The Commission has always taken the position that before issuing a certificate authorizing a separate operation over the route of an existing authorized carrier, a strong showing of inadequateness of existing service should be made. The Commission has the power to regulate service and always has stood ready to hear any complaints against service and to make such orders with reference thereto as the convenience and necessity of the public should require. No complaint has heretofore been made by the merchants in any of the towns named against the service of the certificate holder.

The Commission is of the opinion that the service of the Northern Transportation Company in the past has not been all that it should have been, in this particular territory, and that unless such service is reasonably satisfactory the public convenience and necessity may require the issuance of an additional certificate. However, it might be said that since the application herein was filed an experienced and efficient operator, one S. L. Leach, who resides in and has his headquarters in Greeley, has been made president and manager of the Northern Transportation Company.

[2, 3] The testimony in the instant case showed that the applicant at the time of the filing of his application and thereafter operated as a motor vehicle carrier, without first having obtained

a certificate of public convenience and necessity. In the case of *Re Large*, P.U.R.1927E, 356, this Commission held that no applicant would receive a certificate of public convenience and necessity if he unlawfully operates at the time of the filing of his application and thereafter. In that case, on motion of protestant, the Commission denied the application. A similar motion has been made in the instant case. In the *Large* case, *supra*, the Commission had before it a flagrant intentional violation. The ruling of the Commission in that case was based on its rule 3 (b) which reads—"No motor vehicle carrier shall begin operation or business as such without first obtaining from the Commission a certificate of public convenience and necessity therefor."

Since the adoption of said rule which became effective January 1, 1927, the Commission has found that the motor vehicle carriers throughout the state for the most part have had very little knowledge of the law or our rules and regulations governing their operations. The Commission has found also that in a great many cases a denial of a certificate solely on the ground of the violation of this rule would not only work a hardship on many of the applicants, but on the shipping public as well. Of course, the rule adds nothing to the law as the law exists or as it existed prior to the enactment of House Bill No. 430. The failure of the Commission to deny a certificate on this ground only cannot, of course, legalize an operation made unlawful by the statute, but in determining whether or not a certificate should be denied because of violation of a statute the Commission feels that it must take into consideration other questions such as the need of the public for the operation in question, the duration of the operation, the good faith of the operator, etc.

After careful consideration of all of the evidence and in view of the facts stated, the Commission is of the opinion and so finds that at the present time the public convenience and necessity does not require the motor vehicle system of the applicants for the transportation of merchandise to and from the points named; that during a period of ninety days the merchants doing business in said towns with the Northern Transportation Company should give the service of the latter company a fair test and that

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in the meantime the Commission should retain jurisdiction of the application.

The Commission further finds that the public convenience and necessity requires the motor transportation system by the applicant of milk and cream to Denver, Colorado, from the farmers located in the vicinities of La Salle, Peckham, Gilcrest, Platteville, and Ione.

There was some evidence that the transportation of milk and cream alone cannot be done profitably. The evidence on this point was not as definite and certain as it might have been. If this contention is proved on final hearing, the fact will be given such consideration as it deserves.

ORDER.

It is therefore *ordered* that at the present time the public convenience and necessity does not require the motor vehicle system of the applicants for the transportation of merchandise between Denver, Colorado, and La Salle, Colorado, and those intermediate points of Ione and others intermediate to Ione and La Salle, and this portion of the application for the present shall be, and is hereby, denied.

It is *further ordered* that the Commission should and it hereby does retain jurisdiction of the application.

It is *further ordered* that the public convenience and necessity requires the motor transportation system by the applicant of milk and cream to Denver, Colorado, from the farmers located in the vicinities of La Salle, Peckham, Gilcrest, Platteville, and Ione, and this order shall be taken, deemed and held to be a certificate of public convenience and necessity therefor.

It is *further ordered* that the applicant shall file tariffs of rates, rules and regulations, and time schedules as required by the rules and regulations of this Commission governing motor vehicle carriers, within a period not to exceed twenty days from the date hereof.

It is *further ordered* that the applicant shall operate such motor vehicle carrier system according to the schedule filed with this Commission except when prevented from so doing by the Act of God, the public enemy, or unusual or extreme weather
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conditions; and this order is made subject to compliance by the applicant with the rules and regulations now in force or to be hereafter adopted by the Commission with respect to motor vehicle carriers and also subject to any future legislative action that may be taken with respect thereto.

It is *further ordered* that applicant shall file his written acceptance of the certificate herein granted within a period of twenty days hereof.

MINNESOTA RAILROAD AND WAREHOUSE COMMISSION.

CITY OF ST. PAUL

v.

GREAT NORTHERN RAILWAY COMPANY et al.

[A-4019.]

Crossings — Viaduct construction over railroad tracks in valley.

1. A railroad may not be made to contribute to the expense of a viaduct over its tracks in a valley, where the necessity therefor is wholly independent of the presence of the track and determined by the lay of the land and the needs of the populace, and where there is no showing that the ravine could be filled in at grade in a feasible manner, p. 791.

Crossings — Contribution of railroad for viaduct in excess of public convenience.

2. A railroad is not relieved of its proportionate obligation in bearing the expense of viaduct construction made necessary in whole or in part by the presence of its track where the city in the solution of its traffic problem has decided upon a different and larger structure, and contribution from the carrier may be required to the extent of its original obligation, p. 793.

[November 15, 1927.]

APPLICATION by city of St. Paul for an order requiring various railroads to construct a viaduct over their tracks; construction ordered and cost apportioned between city and railroad on equal basis.

By the **Commission**: On May 31, 1927, the city of St. Paul filed its petition with the Railroad and Warehouse Commission praying for an order requiring the Great Northern P.U.R.1928B.

Railway Company, Northern Pacific Railway Company, the St. Paul Union Depot Company, and the Chicago, Burlington & Quincy Railroad Company to replace the bridge carrying Third street in said city over the tracks of said companies, "with a bridge which will adequately serve the public convenience and will remove the dangers and hazards now existing at the point where the railroad tracks of the companies intersect Third street and which will conform to the plans and specifications" attached to the petition.

Answers were filed by the respective companies denying that the replacement of the bridge was made necessary by the presence of the railroad tracks, and asking that the petition be denied and dismissed. Pursuant to notice duly given the matter was brought on for hearing before the Commission at its offices in the capitol in the city of St. Paul on the 18th day of July, 1927. Hon. Arthur A. Stewart, corporation counsel, and Mr. Eugene M. O'Neill, assistant corporation counsel, appeared for the city of St. Paul, Mr. A. L. Janes, assistant general counsel, for the Great Northern Railway Company, Mr. D. F. Lyons, general counsel, and Mr. F. D. McCarthy, general attorney, for the Northern Pacific Railway Company, Hon. T. D. O'Brien, attorney, of O'Brien, Horn & Stringer, for the St. Paul Union Depot Company, and Denegre, McDermott, Stearns & Stone, attorneys, for the Chicago, Burlington & Quincy Railroad Company.

Witnesses were heard and evidence introduced.

The city of St. Paul is a municipal corporation of the state of Minnesota. Third street is a public thoroughfare in said city, laid out in an easterly and westerly direction, connecting the business section of the city at the west with the residential section on what is known as Dayton's Bluff at the east. The railroad tracks of the companies traverse the valley or gully between these two sections in which once flowed Trout brook and Phalen creek at approximately right angles to Third street.

In or about the year 1887 these companies or their predecessors constructed a bridge to carry Third street over the railroad tracks, which bridge is in existence and use today. The approach to the bridge starts from the west at or about P.U.R.1928B.

John street and terminates easterly at or about Commercial street. From the easterly end of the bridge Third street ascends to the top of the bluff at Maria avenue on a grade making it prohibitory for use by modern traffic. On this ascent Third street passes under Mounds Boulevard which crosses Third street overhead in a northerly and southerly direction between Hoffman avenue and Maria avenue.

The proposed plan of the city is to construct a bridge whose western terminus will be at or about the western terminus of the present bridge and ascending at a grade of 4.1 per cent to its eastern terminus at Maria and connecting with Mounds boulevard at its present grade, Third street between Mounds boulevard and Maria avenue to be filled.

The evidence discloses that the purpose of the city in constructing a bridge as planned is to meet the demands of citizens of St. Paul for speedy and convenient transportation between the business district and the residential district known as Dayton's Bluff, and also to relieve the other arterial crossings of the business district, Sixth and Seventh streets, of present congestion, as well as to make it feasible to handle traffic coming into the city and departing on state trunk highways Nos. 3 and 12 over Third street, thereby routeing such traffic around the congested retail district.

It appeared from the evidence that the city council had also given consideration to a project which would have placed the eastern terminus of the bridge at or about Hoffman avenue, from which point the ascent to the top of the bluff would have been made in a southerly direction over Hoffman avenue to Euclid street. Such a project would have required the replacement of reconstruction of the present bridge at or about its existing level of elevation.

Largely due to the difficulty of approach to the present bridge from the east, a comparatively small amount of traffic uses Third street in crossing the railroad tracks. Bridges at Sixth and Seventh streets crossing the tracks and connecting with Mounds boulevard and streets from the Bluff district are largely used. The present bridge, although constructed many years ago, and parts of its steel or iron structure having been replaced

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by wooden structure, is adequate today to meet the requirements of traffic that actually uses Third street as a crossing over the railroad tracks.

The city's estimated cost of the plan proposed by it is \$803,-846. It contends that it is the obligation of the railroad companies to construct this bridge or viaduct in accordance with the plan proposed. Evidence was also introduced showing the estimated costs of various other plans whereby the carrying of Third street across the railroad tracks might be achieved. These estimated costs are relatively important only in so far as deductions may be made from our conclusions herein.

It is the position of the city that except for the presence of the railroad tracks a fill could be made which would carry Third street to the top of the Bluff at a grade not exceeding 5 per cent and at a cost considerably less than the cost of the proposed project. It is also shown by the city that the estimated cost of the project with a bridge whose eastern terminus would be Hoffman avenue and thence reaching the top of the hill via Hoffman avenue to Euclid street would be \$868,600; if the bridge terminated at the most easterly railroad track and Hoffman avenue were filled from that point the estimated cost of the project would be \$641,409.

[1] The facts in this proceeding are not seriously in dispute, and the law has been settled by the decisions of the supreme court of this state.

The obligation of a railroad was stated by Justice Mitchell in *State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.* 35 Minn. 131, 136, 28 N. W. 3, to be as follows:

"The duty of thus restoring or preserving the free use of the street includes the doing of whatever is needed to accomplish the required end, and which is rendered necessary to be done by reason of the presence of the railroad in the street."

Applying this principle, the supreme court in the so-called *Grove Street Case*, 62 Minn. 450, 453, 64 N. W. 1140, upheld the lower court in determining that there was no obligation on a railroad to construct a bridge across this same valley in accordance with the plan proposed. The court there said:

"Bridging the tracks, that the streets may be opened to the P.U.R.1928B.

public, is proper, necessary, and expedient, not because of the presence of the tracks, but because of the natural surface features of the ground, and lay of the land topographically."

And it was there held that the necessity for the bridging proposed was, "wholly independent of respondent's tracks."

In the so-called Seventh Street Case, 134 Minn. 249, 158 N. W. 972, the court, again applying the principle first above cited, found that the presence of the tracks determined the necessity for the bridging, and held that the obligation rested on the railroad to construct the bridge, it being shown that the street could have been taken across the depression on a fill to reach the top of the hill at a lesser cost had the railroad tracks not been in place.

This latter construction undoubtedly would be applicable were the question confronting us the original construction of the present Third street bridge.

These decisions determine the obligation of the railroads in this proceeding.

There was no evidence introduced by the city to show that a fill at the grade of the proposed bridge was feasible. The railroad engineers testified that it was not feasible and the estimated cost would be in excess of a million dollars.

The proposed plan of the city comes squarely within the holding of the supreme court in the so-called Grove Street Case, *supra*. As stated in the city's brief:

"It is obvious and must be conceded, and we believe it is conceded that the grade from Commercial street to Hoffman is too steep for traffic purposes; and even if the present bridge is strong enough for modern traffic, it would be necessary to eliminate this grade.

"From the evidence in this case we believe it is conclusively established that it is necessary to eliminate the grade from Commercial street to the top of the hill.

"Due to modern traffic requirements, Third street as it now exists across the railroad tracks and up the hill is of no practical value. The present Third street bridge under the conditions now prevailing serves only the few people engaged in business or living at or about the corner of Third and Commercial streets.
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The requirements of the city make necessary construction of a new highway suitable for modern traffic from the business district up to the so-called Dayton's Bluff district.

"There can hardly be any question in the mind of any reasonable person but that the city of St. Paul needs another connection between the so-called Dayton's Bluff district, and the business area."

The determining factor in the plan proposed is not the presence of the railroad tracks, but the topographical lay of the land and the needs of the populace. The obligation of the railroad as stated by the supreme court is to do that "which is rendered necessary to be done by reason of the presence of the railroad in the street."

In so far as the proposed plan of the city is concerned, there is no obligation, under the decisions of our court, resting upon the railroads to construct the same, for the proposed bridge is not rendered necessary by the presence of railroad tracks in Third street.

[2] However, it is conceded by the railroads that some structure to carry Third street across the depression is made necessary by the presence of their tracks. This leads us to determine what their obligation is, and whether or not contribution can be required to the extent of their obligation towards the construction of the bridge proposed by the city.

The city has the power to construct for public purposes the bridge proposed in its plan, the same meeting with the requirements of law.

Chapter 336, Session Laws 1925, provides:

"The Commission may require any railroad company to construct overhead and maintain underground crossings and separate grades when, in its opinion, the interests and safety of the public require, and no overhead or underground crossing, nor separation of grade, shall be made except upon petition therefor to the Commission, and with the approval of the Commission."

Chapter 134, Session Laws 1923, provides:

"It (the Commission) may require said railroad company to construct an overhead or maintain an underground crossing and P.U.R.1928B.

may divide the cost thereof between the railroad company, the town, county, municipal corporation or state highway department interested, on such terms and conditions as to the Commission may seem just and equitable."

Do these laws confer power upon us to require contribution by the railroads to the cost of the project proposed by the city which we determine the railroads are not obligated to construct, on the ground that the railroads could be compelled to contribute to the cost of a project which the presence of their tracks makes necessary?

"The present structure, as we have stated, is sufficient to carry the traffic that is now offered. But the obligation of the railroad is something more. As stated by Justice Mitchell in the case cited by counsel for the city (35 Minn. 131, 135, 28 N. W. 3):

"The legislature never intended to fix or limit the duty of the company by the necessities of the public at any one time, or under any particular state of circumstances. They intended to impose upon the company the duty, from time to time, of putting the street in such condition and state of repair as changed circumstances—such as the increased travel on the street, or increased traffic on the railroad—might render necessary to its free and proper use.'"

The city has the right to handle its traffic problems as it determines is for the public benefit, and if it sees fit to divert additional traffic from present congested streets over the Third street route, that is within its power. It has so determined that it is necessary in the public interest for Third street to carry additional traffic, and it could further determine, if it saw fit, that a reconstruction of the present Third street bridge at about its present elevation was required to handle additional traffic. Under this latter determination, in accordance with the rule stated, the railroads could be required, under Chapter 336, Laws of 1925, and Chapter 134, Laws of 1923, to contribute to the new structure. We cannot see why the railroads should be relieved of this contribution merely because the city determines that its own interests require a different and larger structure.

The present bridge undoubtedly could be strengthened and put in a state of repair which would carry a considerably great-
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er amount and heavier traffic. It has not been condemned by the city. But the evidence is sufficient to warrant the conclusion that if a project of public improvement requiring its use were considered in the light of present-day travel, it should be replaced.

It appears from the evidence that with a 40-foot roadway it would cost \$341,200 to rebuild the existing bridge, and that with a 30-foot roadway the present bridge could be rebuilt for \$199,410. The city's estimated cost of replacing the present bridge with a new structure having a 45-foot roadway coming down to the grade of Commercial street at the east end, is \$437,355, or \$455,300 with a viaduct to the east line of Commercial street.

We believe that contribution to the replacement of the existing bridge is required by the statutes and under the facts in this case. In proceedings involving separation of grades we have in the past divided the cost on a basis of 50-50 between the railroad and the public corporation benefited, and such a division of the cost we find to be just and equitable as hereafter ordered.

The statute requires our approval of any overhead or underground crossing.

We accordingly approve the plan proposed by the city in its application for the carrying of Third street over the tracks of the railroad companies, and order the respondent companies to contribute 50 per cent of the cost of replacement of the present structure of the bridge to meet the modern traffic requirements, which under the evidence in this case, would cost to construct not in excess of \$455,300 for a new bridge with a 45-foot roadway. We do not fix the specific monetary contribution to be made by the carriers but allow that to remain for negotiation and settlement between the parties hereto. In the event an agreement cannot be reached as to the specific amount of the contribution, application may be made herein for such determination.

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MISSOURI PUBLIC SERVICE COMMISSION.

RE CLINTON COUNTY TELEPHONE COMPANY.

[Case No. 4388.]

Valuation — Going concern value — Business attached.

1. An allowance should be made for going value, or in other words for the fact that a property with its business attached and in successful operation has a greater value than the same property ready to operate but not operating and without any attached business, p. 806.

Valuation — Going concern value — Calculation of amount.

2. The proper allowance for going value is not to be determined by rule but is in the final analysis a matter of judgment, p. 806.

Valuation — Working capital — Time of payment of revenues — Telephones.

3. A sum of \$1,500 for working capital on a valuation less depreciation of \$200,231 was allowed a telephone utility although city and rural rentals were collected from one to three months in advance respectively, because of the possibility of an emergency arising to make more cash necessary, p. 806.

Depreciation — Telephone property — Annual allowance.

4. An annual depreciation allowance of $4\frac{1}{2}$ per cent of the original cost of the depreciable property of a telephone company was considered reasonable to cover accruing depreciation, p. 807.

Return — Operating expenses — Rate case expense — Amortization.

5. The expense of a rate proceeding of a telephone company was amortized over a period of five years in an annual fractional charge to operating expense in view of the excessive expense of a rate proceeding as compared with total operating expenses and with the size of the property as well as the relative rarity of the valuation estimate, p. 808.

Return — Reasonableness — Amount allowed — Telephones.

6. An increase in rates to yield a return of 6.27 per cent was allowed to a telephone utility, p. 809.

[November 7, 1927.]

APPLICATION for increased rates; approved.

By the **Commission**:

I.

This case was brought before the Commission by the Clinton County Telephone Company on May 5, 1925, by filing a schedule of increased rates for telephone service. By order of the Commission dated May 27, 1925, the operation of the proposed increased rates was suspended pending investigation.

On June 16, 1925, the Commission issued its order direct-P.U.R.1928B.

ing its accounting department to make an audit of the company's books, and its engineering department to make an appraisal of the company's property. Subsequently the Commission's engineering department made an appraisal of the company's property as of date December 31, 1926; and the Commission's accounting department made an audit of the company's books and records for the purpose of determining the amount of additions and betterments made during the period January 1, 1924 to May 31, 1925. The accounting department had previously made an audit of the company's books to determine the original cost of the company's property as of date December 31, 1923. Said accounting department made a third audit of the company's books and records to determine the amount of additions and betterments made during the period June 1, 1925, to December 31, 1926, and to ascertain the operating results for the year 1926.

Subsequent to the filing of said appraisal and audits, this case was heard at Jefferson City, on August 9, 1927, and submitted on the record.

II.

The audits of the books and records of the company were made by the Commission accountants under the direction of T. J. Murphy, chief accountant. The result of said audit is shown by Commission's Exhibit No. 2.

The appraisal of the company's property was made by Major E. E. Towles, Commission's engineer, under the direction of James L. Harrop, chief engineer, and the result of said appraisal is shown by Commission's Exhibit No. 1. Major Towles' appraisal is on the basis of both original cost and reproduction cost with reproduction cost less depreciation indicated. The appraisal is made as of date December 31, 1926.

The company had two appraisals made of its property on the reproduction cost basis. One appraisal was made by W. C. Polk, consulting engineer, as of date April 1, 1923, and one appraisal was made by J. G. Wray & Company, engineers, as of date August 31, 1926.

In general, there are no major differences between the Com-P.U.R.1928B.

mission's engineers and the company's engineers and there is no controversy as to the value of the property as determined by the Commission's engineers. Counsel for the company stated during the hearing (R 49) "We are accepting not only the Commission's engineer, but as well the Commission's accountant", and again (R 60) "Your Honor, as stated before, we are accepting the report of the engineer of this Commission."

A general statement of the results of the audits and appraisals, dealing only with total property as a unit, and as of dates noted above is as follows:

	P. S. C. Accts.	P. S. C. Engrs.	Wray.	Polk.
Original cost	\$158,901	\$210,364	.....	.....
Reproduction cost .....	.....	295,612	\$295,652	\$262,647
Reproduction cost less depreciation .....	.....	200,231	221,017	189,314

Cash working capital and going value are not included in the foregoing table. Material and supplies are not included in the report of the Commission accountants.

It will be noted the difference between the Commission engineers and J. G. Wray & Company engineers is in the depreciated cost. The difference between Mr. Polk and the Commission engineers is due to the date of Mr. Polk's appraisal which is April 1, 1923.

The Commission engineers made a further separation showing the estimated costs of property in service, property not in service, property in exchange service, and property in toll service as follows:

	Original Cost.	Reproduction Cost.	Reproduction Cost Less Depreciation.
Physical property in service	\$204,019	\$285,666	\$192,611
Physical property not in service ...	6,345	9,946	7,620
Physical property in exchange service	186,002	262,391	175,072
Physical property in toll service ..	18,017	23,275	17,539

The amounts allocated in the above table to exchange and toll properties are not shown in Commission engineers' report but are included in their working papers.

The Clinton County Mutual Telephone Company was incorporated in March 1903, under the laws of the state of Missouri, for the purpose as declared in the articles of incorporation, to P.U.R.1928B.

construct, own, lease, purchase operate, and maintain lines of telephone. On January 2, 1913, the name of the company was changed to the Clinton County Telephone Company.

The company has its principal office in Plattsburg, Missouri, and owns and operates a system of telephone lines and exchanges in Clinton and Buchanan counties, Missouri. The property in general consists of eleven exchange districts. Central office switching facilities are maintained in eight of these districts, the districts thus served being Plattsburg, Agency, Converse, Easton, Gower, Hemple, Trimble, and Turney. In Lathrop, Osborn, and Stewartsville, local exchange switching is accomplished in central offices of other telephone companies. City subscribers at Plattsburg are served by the common battery method, and all other subscribers by the local battery, magneto system. As testified by Mr. Weakley, the company has 2,088 subscribers of whom 475 are served by the common battery method.

The capital stock of the company originally amounted to the sum of \$20,000 par value which by an amendment filed with the secretary of state on May 13, 1904, was increased to \$50,000 par value, consisting of 1,000 shares of \$50 par value each. All of the stock is outstanding. In May and July, 1926, the company issued first mortgage 6-per cent bonds, which were sold for cash at par, to the amount of \$18,000 and all bonds are outstanding.

In October, 1926, the control of the property was obtained by the Middle States Utilities Company of Cedar Rapids, Iowa, by the purchaser of a majority of the capital stock.

Dividends on its outstanding stock have been declared and paid by the company since 1915 as follows:

	Par Value Of Stock.	Dividends.	Per Cent.
1915	\$41,350	\$2,481	6
1916	41,300	4,956	12
1917	100	6	6
1918	41,550	2,493	6
1919	41,350	4,962	12
1920	41,350	2,481	6
1921	41,350	2,481	6
1922	41,700	2,502	6
1923	41,700	2,502	6
1924	50,000	3,000	6
1925	50,000
1926	50,000
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The company in creating a reserve for depreciation opened the account in 1915 with a credit of \$54,853.17, being the amount of depreciation arrived at in an appraisal made by the company's manager. In December, 1919, this amount was thought to have been too high and an adjustment of \$36,019.35 was made which reduced the original estimate to \$18,833.82. During the period January 1, 1915, to December 31, 1923, the company charged operating expenses and credited the reserve for depreciation with \$85,936.35 based on approximately 8 per cent per annum of the book investment in property. From January 1, 1924 to December 31, 1926, depreciation was accrued at the rate of 6 per cent per annum of the book value of the property. The books of the company show an accumulated reserve of \$88,166.06, equivalent to 55 per cent of the adjusted book balance of the company property.

The telephone rates now in effect at applicant's various exchanges and the rates proposed by applicant are as follows:

Plattsburg Exchange.

	Present Rates.	Proposed Rates.
Business, 1 party line, city	\$2.40	\$3.65
Business, 1 party line, rural .....	....	2.15
Residence, 1 party line	1.65	2.15
Residence, 2 party line .....	....	1.90
Residence, 4 party line .....	....	1.65
Residence, extension sets .....	.65	....
Business, extension sets .....	.65	.50
Additional charge, business desk set .....	.25	.25
Additional charge, residence desk set .....	.25	....
Instrument moving inside building .....	.50	1.00
Instrument moving outside building	1.00	2.00
Extension bells .....	.25	....
Special lines—rural .....	....	City Rate plus pin rent.
Pole contracts	5¢ per pin per year.	10¢ per pin per year.
If rural subscriber furnishes all pole line and other equipment .....	.....	\$9.00 per yr.
If company furnishes all pole line and other equipment to rural subscriber	\$13.00 year	\$21.60 year.
Discount if paid 15 days after due	15¢ per mo.	.15
Rents due and payable—rural	Quarterly in adv.	Same
Rents due and payable—city	Monthly in adv.	Same

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Agency, Gower, Easton, Trimble, Turney Exchanges.

	Present Rates.	Proposed Rates.
Business, 1 party line, city	\$2.40	\$3.15
Business, 1 party line, rural .....	....	2.15
Residence, 1 party line	1.65	1.00
Residence, extension sets .....	.65	.50
Business extension sets .....	.65	.50
Added charge—desk set .....	.25	.25
Instrument moving inside building .....	.50	1.00
Instrument moving outside building	1.00	2.00
Extension bells .....	.25	
Special lines—rural .....	....	City rate plus pin rent.
If rural subscriber furnishes all pole line and other equipment	\$7.80 year	\$9.00 year
If company furnishes all pole line and other equipment to rural subscriber	18.00 year	21.60 year
Discount if bills paid within 15 days after due ..	.15 per mo.	.15 per mo.
Rents due and payable—rural	Quarterly in adv.	Same
Rents due and payable—city	Monthly in adv.	Same

Lathrop, Converse, Osborn, Stewartsville Exchanges

The proposed rates are the same as listed for the Agency group shown above although at present the company owns no stations and does no switching in the towns of Lathrop, Osborn, or Stewartsville.

The present rates at Lathrop, Converse, and Stewartsville are the same as at the Agency group shown above except that all stations are rural and no rates are shown for business and residence stations.

There is no schedule of present rates filed for the Osborn exchange.

The Commission in Case No. 5035, P.U.R.1927D, 82 granted the company authority to remove the exchange at Hemple, and to the switching elsewhere and the evidence shows the removal is in progress.

Results of Operation—The report of Commission's accountants shows the following with respect to the results of operation of the company's property for the year ended December 31, 1926.

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	Exchange.	Allocated to Toll.	Total.
Operating revenues	\$36,779.32	\$7,895.28	\$44,674.60
Operating expenses	27,068.15	6,369.96	33,438.11
Net available for depreciation and return	\$9,711.17	\$1,525.32	\$11,236.49
Nonoperating revenue—Rents			290.00
Gross income			\$11,526.49
<i>Deductions from Gross Income</i>			
Depreciation, accrual		\$9,631.11	
Interest on bonds		1,254.38	
Amortization of bond expense		63.18	
Other bond expense		87.50	
Miscellaneous		60.98	
Total deductions			11,097.15
Net income			\$429.34

The report of Commission's accountants shows further that an item of Public Service Commission expense was pro-rated over a period of three years, and that there was included in operating expenses for 1926 by the Commission accountants, one-third of the total of the Public Service Commission expense available at that time. The amount so included was \$3,415.81 of which \$2,469.72 was assigned to exchange property and \$964.09 was assigned to toll property. The total cost, of which the above amounts are one-third, consists almost wholly of the expense of the various audits and appraisal.

The evidence shows that since the date of the said report additional expenses have been incurred by the company in connection with the audit made by this Commission, in the aggregate amount of \$570.16, which should be given consideration in determining the proper amount of Public Service Commission expense.

The company introduced six exhibits of operating expense studies—Exhibits 1 to 4 inclusive, were prepared by Mr. Charles Pinkerton, auditor, connected with the firm of Herdrich & Boggs, certified public accountants, Indianapolis, Indiana. Exhibits 5 & 6 were prepared by Mr. Elmer Weakley, manager of the company.

Exhibit 1 is a copy of the Commission accountants' statement of operating results as detailed, *supra*.
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Exhibit 2 is a copy of Page 1 of the Commission engineers' appraisal report and shows the original cost, reproduction cost, reproduction cost less depreciation, and the annual depreciation requirement of all the company's property used in public service.

Exhibit 3 is a calculation, based on the number of subscribers as of May 31, 1926, showing the present yearly revenue to the company at the present rates and the yearly revenue that would be obtained under the proposed rates as filed by the company. A summary of Exhibit 3 is as follows:

Number of subscriber stations	2,144
Present revenue	\$36,618.00
Proposed revenue	\$46,232.00
Increase in revenue	\$9,614.00

Exhibit 4 purports to show the fairness of the company's request as shown in the schedule of proposed rates. Exhibit 4 is as follows:

	Original Cost.	Cost of Repro- duction Less Depreciation.	Total.
Appraisal of Commission engineers as of December 31, 1926	\$204,019.00	\$193,472.00	\$397,491.00
Plus 10% of above (going value) ..	20,401.90	19,347.20	39,749.10
Totals	\$224,420.90	\$212,819.20	\$437,240.10
Mean average of total			\$218,620.05
Gross income necessary to pay a return of 7% on above amount			\$15,303.40
Gross income before depreciation, for year 1926, (Per P. S. C. of Mo. audit)		\$11,236.49	
Less depreciation requirements		9,000.00	
Gross income after depreciation for year 1926 available for return			2,236.49
Deficiency under present rate		13,066.91	
Estimated increase under proposed rates		9,614.40	

Exhibit 5 is a calculation made by manager Weakley and showing the present and proposed revenues from subscriber stations. The result of Mr. Weakley's calculations shows an increase in revenue, if allowed to operate under the proposed schedule of rates, amounting to \$9,331.20.

Exhibit 6 purports to show the amount and per cent of return if allowed to operate under the proposed schedule. Exhibit 6 is as follows:
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Appraisal as of December 31, 1926, P. S. C. of Mo.:	
Cost of reproduction less depreciation of plant in use	\$193,472.00
Going value 10%	19,347.20
Total	<u>\$212,819.20</u>
Available for depreciation and return as audit by	
Public Service Commission	\$11,236.49
Proposed increase	<u>9,331.20</u>
Available under proposed rates for depreciation and return	\$20,567.69
Net revenue available for depreciation and return would give a return of 9.66%.	

The Commission furnished all interested public officials of the various communities and counties receiving service from the company, with copies of the audits and appraisal made by the Commission's accounting and engineering departments. Notice of the hearing in this matter was also given to all interested parties.

The Commission has not received any objection to the services rendered by the company, or to the granting of the proposed schedule of increased rates to subscribers, nor did any objector to said service or increased rates appear at the hearing.

The company operates its property as one system, maintaining trunk lines between all exchanges, and no toll charge is made for service rendered between exchanges. The Manager, Mr. Weakley, testified this is the class of service desired by the subscribers, although it is not his own theory of the best manner of operation.

The toll property of the company consists chiefly of pole lines to St. Joseph, Missouri, and proportional parts of the general office building and land, switchboard and equipment.

III.

The Commission accountants found the book value of the company's physical property as of date December 31, 1926, to be \$158,901, exclusive of material and supplies. The said accountant's report is based on an estimated appraised value of \$98,339.13, made by the company's manager in 1915. There is no way of checking the entry of \$98,339.13. The Commission engineers found the undepreciated original cost of all physical property, including construction overhead costs, material and P.U.R.1928B.

supplies, and land at its present fair market value, and as of date December 31, 1926, to be \$210,364. The original cost of property not used as determined by the Commission engineers as of date December 31, 1926, is \$6,345.

In view of the foregoing and all the evidence herein, it appears that the audits do not reflect the true cost of the plant and that the original cost of the physical property as of date December 31, 1926, as determined by the Commission engineers is more accurate and justifiable. The Commission, therefore, finds the original cost of the physical property of this company, including material and supplies and including land at its present fair market value is the sum of \$210,000.

The estimated reproduction cost and reproduction cost less depreciation of the company a physical property including material and supplies, as of date December 31, 1926, are as follows:

	Reproduction Cost.	Reproduction Cost Less Depreciation.
Property in public service	\$285,666	\$192,611
Property not in public service	9,946	7,620
Total physical property	\$295,612	\$200,231

The foregoing estimates were prepared by the Commission engineers and their reproduction cost is practically the same as that submitted by J. G. Wray & Company engineers. The latter engineers however have given the property a higher depreciated value. The evidence shows the Commission engineers spent considerable time inspecting the property and records and in making a detailed study of the property for the purpose of depreciating same. The J. G. Wray & Company engineers very apparently did not spend so much effort along this line as is evidenced in their letter of transmittal to the company in which they state a larger percentage than usual is included for omissions due to the short time spent in making the appraisal. No testimony was offered by the company on behalf of the Wray appraisal.

No satisfactory comparison can be made with the appraisal of Mr. Polk. His appraisal is of date April 1, 1923, and between this date and December 31, 1923, many improvements and

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changes have been effected in the property, including the installation of a modern switchboard at the Plattsburg exchange, purchase of a general office building, and considerable rebuilding of pole lines.

In view of the foregoing and all the evidence herein, it appears the foregoing costs as found by the Commission engineers are more equitable and more nearly correct.

In view of all the evidence herein, it appears that the reproduction cost of the physical property of this company as of date December 31, 1926, and including material and supplies, is the sum of \$295,612, and likewise the reproduction cost less depreciation of the physical property of this company as of date December 31, 1926, is the sum of \$200,231.

[1] An allowance should be made for going value or going concern value; or in other words for the fact that a property with its business attached and in successful operation has a greater value than the same property ready to operate, but not operating and without any attached business.

[2] There is no generally recognized rule for calculating going value. The proper allowance is in the final analysis a matter of judgment.

The evidence shows that the company is without competition in the territory it serves and that it has 2,088 subscriber stations in operation. The company serves a highly developed agricultural and stock raising territory. During recent years the number of subscribers has remained practically stationary. The company paid no dividends during the years 1925 and 1926.

The company submitted evidence indicating they consider 10 per cent of the reproduction cost less depreciation a fair amount to be added as going value.

In view of the foregoing and all the evidence herein, it appears that \$13,000 constitutes a just and reasonable allowance for going value in this proceeding.

[3] Commission engineers made no allowance for working capital since the company collects the rentals on city telephones one month in advance, and on rural telephones three months in advance. The Commission is of the opinion that an emergency might arise wherein a larger amount of cash than is ordinarily P.U.R.1928B.

carried in the company's account may be needed and in view of this will allow cash working capital in the amount of \$1,500.

Summarizing our specific findings upon the company's property, we have the following:

Original cost of physical property	\$210,000
Reproduction cost of physical property	295,612
Reproduction cost less depreciation	200,231
Going value	13,000
Cash working capital	1,500

In view of the foregoing and after a careful examination and consideration of all of the evidence herein, we find the present fair value of the property of the Clinton County Telephone Company, including all elements of value, tangible and intangible, as of December 31, 1926, to be \$217,000.

In general practice, sums necessary to cover depreciation and computed on the estimated life of the property are periodically charged to operating expenses and concurrently credited to the reserve for accrued depreciation. The Commission engineers have made an estimate of such an annual depreciation requirement based on the original cost of the items of property and the expected life. This amounts to \$8,838.

The company during the year 1926, charged to operating expenses the sum of \$9,631.11, and since 1915 have charged both 6 per cent and 8 per cent for accrued depreciation.

[4] The Commission is of the opinion that an excessive amount has been charged as an annual depreciation requirement and that $4\frac{1}{2}$ per cent of the original cost of the depreciable property of the company is a reasonable annual allowance to cover accruing depreciation. We estimate the original cost of the depreciable property to be \$194,432. $4\frac{1}{2}$ per cent of this amount is \$8,750, which sum we conclude is a reasonable allowance to cover accruing depreciation at this time.

This is a matter of adjusting the rates covering exchange service of the Clinton County Telephone Company. Changes in toll charges are not sought and no evidence has been introduced covering such rates or charges. It is, therefore, necessary to determine the fair present value of the property of the company used only in exchange service and exclusive of all toll property.

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The report of the Commission engineers is accepted and their division of the cost of exchange and toll property is the only evidence this Commission has upon which to base a fair value of the company's exchange property.

The separation of physical property as between exchange and toll as determined by the Commission engineers is as follows:

	Original Cost.	Cost of Reproduction.	Cost of Repro- duction Less Depreciation.
Exchange property in service	\$186,002	\$262,391	\$175,072
Toll property in service	18,017	23,275	17,539
Total	\$204,019	\$285,666	\$192,611

Going value to the full amount of \$13,000 and \$1,500 cash working capital should be pro-rated between the exchange and toll properties.

In view of the foregoing and after a careful consideration of all the evidence herein, we find the present fair value of the property of the Clinton County Telephone Company used in public service, and including all elements of value, tangible and intangible, as of December 31, 1926, to be the sum of \$210,000.

Likewise, and in the same manner we find the present fair value of the property used in exchange service to be \$191,000.

Likewise, and in the same manner we find the present fair value of the property used in toll service to be \$19,000.

The report of Commission accountants shows the following with respect to the results of operation of the Company's exchange property for the year ending December 31, 1926:

Operating revenues	\$36,779.32
Operating expenses	27,068.15
Balance available for depreciation and return	\$9,711.17

As is heretofore shown the said accountants' statement of operating expenses includes one-third of the cost then available, of this valuation case, or \$2,469.72, and additional expense not then available have amounted to \$570.16. It, therefore, becomes apparent that the total cost to the company of these proceedings, chargeable to exchange operations, has been \$7,979.32.

[5] Rate case expenses such as these are not of a constantly P.U.R.1928B.

recurring nature and it has been the practice of most State Commissions and of this Commission to pro-rate the same over a period of years.

In view of the amount of this rate case expense as compared with total operating expenses and as compared with the size of this property, it appears to be fair and equitable in this case, to amortize such expenses over a period of five years. This basis will result, until such expenses shall have been amortized, in an annual charge to exchange operating expenses of \$1,595.86.

The amount allowed by Commission accountants for rate case expenses will, therefore, be reduced to \$1,595.86, and the exchange operating expenses for the year 1926 will be reduced by \$873.86 or to \$26,194.29.

Adjusting exchange revenues and expenses for 1926 in accordance with the foregoing, we have

Operating revenues	\$36,779.32
Operating expenses	26,194.29
Balance available for depreciation and return	\$10,585.03

Mr. Weakley, manager of the company, estimates the proposed increase in rates will produce an additional return of \$9,331 to the exchange property. We, therefore, estimate the effect of the proposed rates as follows:

Exchange Property.

Net available revenue for depreciation and return as adjusted	\$10,585
Estimated increase due to proposed rates	9,331
Total	\$19,916
Deduct depreciation allowance, 4½% of depreciable exchange property, \$176,432	7,940
Balance available for return	\$11,976

[6] The above is equivalent to 6.27 per cent on \$191,000. It is, therefore, apparent that the proposed rates are not excessive or unreasonable and that applicant should be authorized to charge and collect same for telephone service rendered by its various exchanges, and that said service shall include free use between all subscribers of the company and between all exchanges of the company by said subscribers.

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An order will issue in accordance with the foregoing.
[Order omitted.]

Brown, Chairman, Ing and Calfee, Commissioners, concur;
Hutchison, Commissioner, absent; Porter, Commissioner, concurs
in results.

MISSOURI PUBLIC SERVICE COMMISSION.

RE MISSOURI CITY TELEPHONE COMPANY.

[Case No. 5606.]

Appeal and review — Notice of hearing — Inadequate service — Telephone.

1. A contention by a telephone utility, in moving to have an order granting a certificate to a rival company to operate a city exchange set aside, that it was not advised when application had been filed by a second company and that it had no notice of hearing, was overruled where it was not explained why the first company should have remained uninformed as to unsatisfactory service conditions in the territory that had resulted in the granting of a franchise to the second company, concerning which the first company had been notified in ample time to contest the same, p. 814.

Monopoly and competition — Duplication of facilities — Inadequate service — Telephone.

2. Telephone service by a second company which has secured a franchise to establish an exchange should be permitted, notwithstanding the expense usually incident to the duplication of such facilities in one community, where existing service, furnished from an exchange in another city, is inadequate and there is no assurance of improvement, by the utility occupying the field, within a reasonable time, p. 814.

[January 28, 1928.]

MOTION by a telephone utility to set aside a previous order of the Commission granting a certificate to a rival utility to operate an exchange; motion overruled.

By the **Commission:**

Statement:

On December 8, 1927, the Southwestern Bell Telephone Company filed a motion with this Commission to set aside the order rendered in this cause, and as reasons therefor alleged: That P.U.R.1928B.

said Southwestern Bell Telephone Company has been furnishing telephone service to citizens of Henrietta for many years and that it is now furnishing telephone service to 27 subscribers in the city of Henrietta; that said service is being furnished over lines connected to the switch board of said Southwestern Bell Telephone Company at Richmond, Missouri; that Henrietta is located approximately $3\frac{1}{2}$ miles from Richmond, and that it is furnishing telephone service to 153 rural subscribers located in the vicinity of Henrietta.

The mover herein further alleges that it was not advised that an application had been filed with this Commission by the Missouri City Telephone Company for permission to build an exchange at Henrietta; that it received no notice of any hearing; that it was advised only within the last few days of the order issued by the Commission; that it is ready and willing to furnish reasonably adequate and efficient telephone service to citizens of Henrietta; that the building of a telephone exchange by the Missouri City Telephone Company at Henrietta will create a competitive condition between said companies and will result in a duplication of facilities and unsatisfactory telephone service. Said mover further states that there is a demand on the part of certain subscribers at Henrietta for its telephone service and that it cannot, on account of this demand and on account of its facilities in Henrietta, withdraw its service. It, therefore, requests that the Commission set aside its order and permit it to be heard in regard to the matters and things set out in its motion.

The Missouri City Telephone Company, in due time, filed an answer to the motion of the Southwestern Bell Telephone Company, and, among other things, alleges that the said Southwestern Bell Telephone Company was informed in July, 1927, that said Missouri City Telephone Company was about to apply for a franchise to build a telephone exchange in the town of Henrietta, was informed of the granting of said franchise by said town of Henrietta and made no protest at any time. The answer further states that the Bell Company is and always has been unwilling to locate a telephone exchange at Henrietta, and that the town of Henrietta, on account of its size and importance, P.U.R.1928B.

cannot be given efficient service except by an exchange located in said town. Said Missouri City Telephone Company further alleges that the Southwestern Bell Telephone Company has for many years rendered the town of Henrietta totally inadequate and highly unsatisfactory service by means of party lines off of its Richmond exchange, having at times as high as fourteen subscribers on one party line, and that the citizens and city government of Henrietta have for several years past used strenuous efforts to obtain better service from said Southwestern Bell Telephone Company without avail.

A hearing was had by the Commission on said motion at the Commission's hearing room at Jefferson City on the 19th day of December, 1927, and testimony was given by the mover herein and by the Missouri City Telephone Company.

Facts:

Henrietta is a city of approximately seven hundred inhabitants, and is located about $3\frac{1}{2}$ miles from the city of Richmond, the county seat of Ray county. The city of Henrietta granted a franchise in 1927 to the Missouri City Telephone Company, authorizing it to establish a telephone exchange and engage in the telephone business in said city. At the time said franchise was granted the Southwestern Bell Telephone Company was, and still is, rendering service to about twenty-seven subscribers in the town of Henrietta, said service being furnished from the Richmond exchange. Said Bell Company is also furnishing telephone service to approximately one hundred fifty rural subscribers in the vicinity of Henrietta through the same exchange.

A representative of the Missouri City Telephone Company and a representative of the Southwestern Bell Telephone Company made a joint canvass of the telephone subscribers in the city of Henrietta to determine their wishes in regard to the establishment of an exchange by the Missouri City Telephone Company, and it was ascertained that of the number interviewed only eight desired to retain the service of the Bell Telephone Company.

Several witnesses testified that the service being furnished
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by the Southwestern Bell Company is inadequate and unsatisfactory.

The Missouri City Telephone Company maintains exchanges at Missouri City and Orrick. Missouri City is about twenty miles from Henrietta and Orrick is about eleven miles from Henrietta. The Missouri City Company maintains a rural telephone service to within about six miles of Henrietta, and operates some toll lines in connection with its exchanges.

Mr. A. J. Blackwell, mayor of the city of Henrietta, stated that from his observation and conversation with the people of Henrietta, there is only one man that he knew of who did not want an exchange in said city. He expressed the opinion that all of the business men and practically all of the citizens favor the establishment of an exchange by the Missouri City Company. Mr. Blackwell further stated that he had a talk with the field engineer of the Southwestern Bell Telephone Company sometime last year, in which he requested the installation of an exchange in said city, and that his request was not granted. He further stated that this representative of the Bell Telephone Company informed him at that time that the service at Henrietta could not be improved under two years, but that he later stated it could be improved sooner.

The postmaster of Henrietta testified that the service rendered by the Bell Company is not good; that on one occasion a call was put in at his store for some one in the city of Sedalia, and that it took more than one hour to get the connection. He further stated that he knew of one-half dozen cases where one could get in a car and drive to Richmond quicker than they could get central, the distance to Richmond from the postoffice being five miles. All of the witnesses on behalf of the Missouri City Telephone Company stated that there is a demand in Henrietta for a local telephone exchange.

The Southwestern Bell Telephone Company has no franchise and has made no application for a franchise to engage in the telephone business in the city of Henrietta.

Mr. C. A. Ulfers, general manager of the Southwestern Bell Telephone Company, located at Kansas City, stated that the Southwestern Company acquired the telephone property of Hen-P.U.R.1928B.

rietta July 1, 1926; that since that time the company has made plans for a complete rebuilding of the Richmond exchange and have taken into consideration service to Henrietta. He stated that they have made no definite plans outside of improving the physical condition of the existing lines between Henrietta and Richmond; that the improvement program does not contemplate an exchange for Henrietta, but that they do propose to improve the service they now have. He further stated that it is his opinion that the people of Henrietta are entitled to an exchange if they want one and suggested that the present and prospective telephone subscribers in Henrietta and the rural telephone subscribers in the vicinity of Henrietta should be consulted to determine whether or not they desire the establishment of an exchange at Henrietta. Mr. Ulfers further stated that the Southwestern Bell Telephone Company could not practically or consistently grant a toll outlet to a competing company, but that if a canvass of the present and prospective telephone subscribers indicates that a local exchange should be established at Henrietta, the Bell Company would be willing to put the exchange in; that is, if a majority of the present and prospective users, both urban and rural, want and request a local exchange in Henrietta, the Bell Company would provide the exchange. Mr. Ulfers stated that he knew nothing of the conditions at Henrietta until this case came before the Commission.

Conclusions:

[1, 2] The testimony in this case undoubtedly shows that the people of Henrietta want a telephone exchange established in said city, and that one is needed. The fact that a franchise authorizing the establishment of a telephone exchange and business in said city has been granted, indicates the desire of the people of said city. The question to be determined then is whether this Commission shall authorize the company which has a franchise to establish the exchange, or grant the authority to a company which has no franchise and has no assurance it can obtain one. It does not appear why the general manager of the Southwestern Bell Telephone Company has remained uninformed as to the conditions existing at Henrietta. The Bell P.U.R.1928B.

Company has had from July 1, 1926, to the hearing of this case to find out about the conditions there, and with proper local management the general manager would undoubtedly have been advised of conditions. No public utility should permit the service of a community to become such that its patrons and the people generally want to secure other service. Attention should be given to complaints and to the needs of the patrons before that condition arises. This Commission does not favor a duplication of telephone service when the service rendered is adequate, efficient, and satisfactory. There is no question that it is more expensive to maintain the service of two telephone companies in a community than it is to maintain one, and this Commission will not permit two telephone plants in any community unless it appears that the service rendered is inadequate and that there is no assurance of adequate service being furnished by the utility occupying the field within a reasonable time.

The Commission is of the opinion that the people of the city of Henrietta are entitled to better telephone service, and that their desire for a telephone exchange in said city is reasonable. The mover herein does not agree to establish an exchange in said city, and has no definite plan for furnishing adequate service within a reasonable time.

The Commission is, therefore, of the opinion, after a careful consideration of all the facts developed in this case, that it would not be justified in setting aside the order heretofore issued and that the prayer of the applicant to set aside said order should be denied.

It is, therefore,

Ordered: 1. That the motion of the Southwestern Bell Telephone Company to set aside the order heretofore made in this cause be and the same is hereby denied.

Ordered: 2. That this order be effective on this date, and that the secretary of this Commission shall serve certified copies of this report and order on the parties interested herein.

Brown, Chairman, Ing, Calfee, and Porter, Commissioners, concur; Hutchison, Commissioner, absent.

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MONTANA BOARD OF RAILROAD COMMISSIONERS.

RE BILLINGS-SHERIDAN BUS LINE.

[Docket No. 996, Report & Order No. 1502.]

Certificates of convenience and necessity — Evidence of necessity.

1. Both necessity and convenience are required elements in an application for a certificate and the absence of either one is fatal, p. 819.

Certificates of convenience and necessity — Evidence of necessity — Circulating petition.

2. A certificate to operate a motor utility was refused where the only evidence of necessity was a petition signed by the inhabitants along the proposed route, which did not purport to state that present rail service was inadequate, but only asserted that the new service would be more convenient, p. 819.

Evidence — Statements under oath — Circulating petition.

3. Statements under oath carry much more weight, especially when there is an opportunity for cross examination, than circulating petitions in view of the fact that it is an easy matter to secure signatures to almost any kind of a petition, p. 819.

[January 26, 1928.]

APPLICATION of two operators, co-partners, of a motor utility for a certificate of convenience and necessity authorizing transportation of persons and property; denied.

Appearances: Gunn and Maddox, for applicants; Wood & Cook, for protestant, Chicago, Burlington & Quincy Railroad Company; and Francis A. Silver, for the Board.

By the **Board**: Lee Huss and Vern F. Knedler, residents of Hardin, Montana, petition the Board for a certificate authorizing them as co-partners, under the style and designation "Sheridan-Billings Transportation Company," to operate motor vehicles in furnishing passenger and freight service between Billings, Montana, and the Montana-Wyoming boundary line on their proposed interstate run between Billings, Montana, and Sheridan, Wyoming. The application is opposed by the Chicago, Burlington & Quincy Railroad Company.

In behalf of the application it is shown that the petitioners are personally trustworthy and have sufficient financial backing to insure the acquisition of suitable equipment.

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The proposed route follows the Custer Battlefield highway, and parallels the Chicago, Burlington & Quincy Railroad practically the entire distance between Billings and Sheridan. Two standard 15-passenger busses and two 3-ton standard trucks are proposed to be used in providing daily passenger and freight service each way. Applicants' schedule provides two southbound trips for the passenger busses leaving Billings at 8 A. M. and 3 P. M. respectively. Northbound it is proposed to leave Sheridan with passengers at 7 A. M. and 3 P. M. respectively. Freight trips are scheduled to leave opposite ends of the route at 9 A. M. daily.

On the question of necessity and convenience, evidence is submitted in the shape of petitions signed by business men and residents of the various towns of consequence along the proposed route. These petitions are identical in language and request the Board to grant the application of Huss and Knedler and represent that if the application is granted "it would lead to better services, passenger, freight, and express, between said points." No statement or representation is made as to the adequacy or convenience of the present service now afforded these communities by protestant.

The proposed route is approximately one hundred thirty-eight miles in length and all but about thirty miles of it is in the Yellowstone and Big Horn counties. Hardin, the county seat of Big Horn county, which enjoys a population of about two thousand, is the largest city between the termini along the proposed route. Crow Agency with a population of about six hundred; Lodge Grass with a similar population in point of numbers, and Wyola with some two hundred residents are the other towns of consequence along the route in Montana. The surrounding territory is devoted largely to farming and stock raising and for the greater part is made up of Crow and Tongue river Indian reservations.

It is maintained by the applicants that the present rail service into this territory is not adequate to the needs of the communities and agriculturists. It is pointed out that the Burlington Railroad operates passenger trains between the points proposed as termini upon the following schedule:

<i>Southbound.</i>		<i>Northbound</i>	
(Trains Nos. 42 & 44)		(Trains Nos. 41 & 43)	
Lv. Billings	7:00 A. M.- 7:10 P. M.	Lv. Sheridan	3:50 P. M.-1:00 A. M.
Ar. Sheridan	11:45 A. M.-11:30 P. M.	Ar. Billings	9:00 P. M.-5:30 A. M.

No particular criticism is levelled at the southbound passenger service, but it is vigorously contended that the northbound service does not meet the convenience of the residents of the towns along the line and in contiguous territory. It is pointed out that a resident of Hardin desiring to transact business in Billings has to board the train at 3:48 in the morning, an inconvenient hour, arriving in Billings at 5:30 A. M. where he is compelled to sit around in hotel lobbies until business hours, or, he has the alternate of boarding the 6:53 P. M. train and spending the night in Billings at some expense. Admittedly, there is some merit to this complaint on the score of the inconvenience involved. The Burlington explains the northbound schedule was arranged to make connections with the transcontinental lines at Billings.

With reference to the local freight service maintained between Billings and Sheridan it is shown that it is of the alternate day type—southbound freight being handled from Billings to Sheridan and intermediate points on one day and northbound freight being handled over the line on the succeeding day. It is argued that perishable commodities suffer through this arrangement and that motor vehicle freight service would permit a delivery of such commodities every day.

Protestant defends the present service as being adequate and maintains that any inroads on its revenues will seriously impair its ability to render the local service now provided. It is testified that when there is an additional call for freight business, such as occurred in the fall of 1927, the railroad puts on a local train each way. Further, that in addition to the local freight service, it runs a regular freight out of Billings each night for the east (No. 80), which handles perishable freight between Billings and Sheridan when necessary.

A number of exhibits were introduced by protestant tending to show the volume of passenger and express business handled between these points. From these exhibits it is apparent that the railroad with present facilities is in a position to handle

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much more traffic than originates in the Billings-Sheridan territory. It is contended that the operations of this particular division yield no net profit to the carrier. A check of the volume of local freight business was not made.

Protestant maintains that its service has not been complained of as being inadequate or inconvenient by the patrons of the railroad nor by residents of the territory affected. No complaints are on file with it nor are any on file with the Board of Railroad Commissioners.

Upon behalf of protestant it is denied that there is any clamor for a bus line over the proposed route. The applicants, it asserts, are not attempting to cater to a public demand but are in the field solely for their personal financial enhancement.

[1, 2] From a consideration of the record, the Board does not find that any necessity exists for the service proposed. Undoubtedly, a bus line, as proposed, between Billings and Sheridan would be in some respects a convenience to the inhabitants of the territory along the route. But the Board is committed to the rule—based upon court decisions—that both necessity and convenience are required elements in the applicant's case and that the absence of either is fatal. (Re Kelly, 19 M. U. R. —, P.U.R.1927A, 832; Re Dahl, Docket No. 237, March 21, 1927.) Applicants have failed to show the existence of necessity in the instant case. The petitions signed by the inhabitants of the towns along the route do not purport to state that the present rail service is inadequate to their needs, as above pointed out the petitioners only assert that the establishment of the bus line will lead to "better service"—in other words, will better suit their convenience.

[3] Again, in establishing the requisite elements of a case such as this, the use of petitions circulated ex parte are of doubtful value. While the Board does not purport to be bound by the strict rules of evidence obtaining in judicial tribunals, it cannot fail to recognize the fact that it is an easy matter to secure signatures to almost any kind of a petition. Statements under oath carry much more weight with the Board and especially when there is also present the opportunity for cross examination.

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NEW YORK DEPARTMENT OF PUBLIC SERVICE
METROPOLITAN DIVISION (TRANSIT COMMISSION).

RE SECOND AVENUE RAILROAD COMPANY.

[Case No. 2883.]

Consolidation, merger, and sale — Metropolitan transit reorganization plan.

1. A plan of a reorganization committee, purchasers at a judicial sale of street railway properties, whereby a real estate corporation was to be formed to take over the car-barn property, yielding a substantial net annual income in rentals, and whereby the traction system, having a net annual deficit somewhat in excess of such income, was to be conveyed to a newly formed operating company, was held economically unsound and foredoomed to failure in view of the fact that the operating corporation, bereft of its barn, the only valuable asset of the property, would be faced with the problem of paying rent for the use of its portion of space without funds to meet operating expenses and in view of the further fact that the separation of properties was likely to result in the ultimate discontinuance of service to the inconvenience of 17,000,000 patrons, p. 822.

Consolidation, merger, and sale — Transit reorganization — Unity of traction assets.

2. A reorganization plan by the purchasers at a judicial sale of street railway properties, whereby the real assets and operating rights are to be conveyed separately to two newly formed corporations, is contrary to a law (§ 151, Railroad Law), mandatory in its character, providing that such purchasers may convey "property and franchises" to a "railroad corporation," in view of the apparent intent of the statute that such assets be not separated, p. 825.

Consolidation, merger, and sale — Transit reorganization — Duty of purchasing companies to serve.

3. A reorganization plan by the purchasers at a judicial sale of street railway properties, whereby the real assets and operating rights are to be conveyed to two new companies respectively is contrary to a law (§ 96, Stock Corporation Law) providing that a new corporation buying from such purchasers is to be vested with "all the rights, privileges and franchises" of the defunct company and "shall be subject to all the duties imposed by law on that corporation," p. 825.

Return — Operating expenses — Street paving — Railway company.

4. The cost of paving streets in compliance with statute (§ 178, Railroad Law) is just as legitimate an operating expense as the items of salaries and wages of officers and employees of a railroad system, p. 827.

Consolidation, merger, and sale — Transit reorganization — Improvident plan.

5. There would be no justification for permitting the consummation P.U.R.1928B.

of a transit reorganization plan that is foredoomed to failure, through the withdrawal of the only part of the property that has any revenue value, even if the law permitted this to be done, p. 827.

[February 1, 1923.]

APPLICATION of a city transit reorganization committee for approval of a plan for the reorganization of a traction system in the city of New York; plan disapproved and application denied.

Lockwood, Commissioner: This is an application under § 55-a of the Public Service Commission Law for the authorization by the Commission of the proposed reorganization of the Second Avenue Railroad Company in the city of New York.

This company was organized on December 11, 1852. On September 19, 1908, a receiver was appointed in foreclosure proceedings on account of default of the payment of interest on the first consolidated mortgage bonds. On June 30, 1927, there were outstanding \$5,682,000 first consolidated mortgage 5's, maturing February 1, 1948, and \$38,000 debenture 5's matured January 1, 1909. There was also outstanding \$1,862,000 par value of capital stock.

On October 1, 1918, the receiver issued \$3,140,000, 6 per cent receiver's certificates, due October 1, 1919, in exchange for a like amount of receiver's certificates which had matured. The receiver defaulted in the payment of principal and since April 1, 1919, has not paid interest on these new certificates. A committee representing the certificate holders, procured a judgment of foreclosure and sale in the supreme court on June 29, 1921.

The judgment fixed the amount due on said certificates, adjudicated the priority of their liens and the order of priority of claims against the company and directed the sale of the property and franchises, subject to all taxes and assessments prior to the lien of the certificates. At the sale on September 22, 1927, the entire property was bid in for \$500,000 on behalf of the committee in a plan of reorganization which makes the application in this case.

The plan contemplates the organization of two separate corporations: one, a real estate corporation, to take title to the P.U.R.1928B.

land, buildings, and appurtenances used as a car barn and situated between 96th and 97th streets, First and Second avenues, Manhattan, and all other property except that to be mentioned—and the other, a railroad corporation, to take title, subject to franchise taxes, of the railroad, franchise, equipment, and other property essential to the operation of the street railroad. The capitalization of the railroad corporation is to be 34,000 shares of common stock without par value and a bonded indebtedness not to exceed \$750,000. The stock is to be distributed among the certificate holders and other creditors.

[1] I am of the opinion that the plan, in its present form, should not be approved by the Commission. It not only gives no assurance that the road can be operated but every assurance, on the contrary, that it will not and cannot be operated for any substantial length of time.

The purpose seems to be to withdraw from the old company and vest in a separate corporation the car barn occupying the square block between First and Second avenues and 96th and 97th streets. This is the only valuable asset and the only one that returns any net revenue in the hands of the reorganization committee.

It appears from the quarterly report for September 30, 1927, filed with the Commission that the receiver's current assets (exclusive of \$49,000 materials and supplies) amounted to approximately \$500,000, and from the plan that the expenses of the committee and its counsel, with costs and allowances under the judgment and sale, amount to \$215,000; in addition to which \$100,000 will be needed to reimburse the committee for moneys expended in the purchase of tort claims at a discount, and for other miscellaneous expenses by the committee.

It further appears that a maximum of \$750,000 will come into the hands of the new company from the sale to the real-estate corporation of that amount of 10-year bonds of the railway corporation, but there is no sufficient showing of what is to be done with that money or how much, if any, of it will be left in the treasury of the railway corporation. The plan is surprisingly indefinite on the important question of the working capital that will be available to the railway corporation, either from

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the assets now in the hands of the receiver or from the moneys to be raised by the sale of bonds.

Forty-seven per cent of the car-barn space is now leased to the New York & Harlem Railroad Company at a rental of \$11,500 per month,—equal to \$138,000 per year. The balance of the space is at present utilized by the receiver of the railway corporation. But there is nowhere in the plan itself any suggestion as to where, or how or on what terms, if at all, the cars are to be stored after the real-estate corporation is separated from the railway. It is stated in the company's brief that "the real estate corporation will rent a sufficient portion of the car barn for the railroad's use, on the basis of a percentage of its net earnings," but for aught that can be ascertained from the plan, the railway company will find itself homeless, with no place in which to store its cars.

Before making any allowance for rental of the floor space in the car barn occupied by the railway company, and after crediting to income of the railway company the former rental of \$96,360 per year paid by the New York & Harlem Railroad Company for the use of its part of the car barns (which in 1927 was increased to \$141,000), the net income available for fixed charges of the railway company for the six years ended June 30, 1927, without making allowance for depreciation, has been as follows:

1922	(deficit)	42,937.76	(red figure)
1923		28,787.55	
1924		95,818.07	
1925		56,885.54	
1926		69,084.39	
1927		106,783.57	

It will be observed that these net earnings (even before depreciation) are considerably less than the revenue received from the New York & Harlem Railroad Company for rental of its share of the car barn, and that they do not take into account anything for the rental of the 53 per cent of space occupied by the railway company.

How the new railway company, bereft of the car barn, and faced with the problem of paying rent for the use of its portion of the space is to meet operating expenses is nowhere explained. P.U.R.1928B.

In addition to this we are confronted by the fact that since 1907, during all of which time the company has been in the hands of successive receivers, the city of New York has been required to expend a total of \$641,024.41 for the paving of the streets within the railroad area, by reason of the default of the company and the receivers in complying with § 178 of the Railroad Law.

This claim of the city has been wiped out upon the sale to the reorganization committee of the receivers' certificates.

Notwithstanding the fact that the revenue from the car barn increased in 1927 by about \$45,000, the receiver's net deficit (after interest deductions) for that year was \$104,335. It is now proposed to eliminate the car barn, thus taking away from the company gross revenue amounting to \$138,000 per year, less expenses and taxes of \$48,000, or a loss of \$90,000 in net revenue per year.

Not only is no provision made under the plan for the reimbursement of these large amounts, or any part of them, but it is evident that if this reorganization is permitted, with the separating and removing from the assets of the railway company of the only property of any real value, the city will have no means of recouping future paving charges.

Attached hereto is a tabulation showing the results of operation for the fiscal years ended June 30, 1927 and 1926, and for the five months ended November 30, 1927 and 1926, as reported by the receiver to the Commission.

This tabulation shows that for the year 1927 the rental received for the use of a portion of the car barn by the New York & Harlem Railroad Company was \$141,000. Repairs to the car barn amounted to approximately \$10,000 and taxes \$38,000 making a net revenue from the car barn of \$93,000 plus the use of the remaining space (53 per cent) without any expense to the receiver. The gross income available for interest and rentals in 1927 was approximately \$107,000. If the proposed plan had been in effect during that year there would have been available a maximum of \$14,000 with which to pay rental for the use of 53 per cent of the space in the car barn and nothing

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whatsoever for interest on the bonds of the new railway company.

For the five-month period ended November 30, 1927, the tabulation shows a decrease in passenger revenue of \$23,000. Income available for fixed charges amounted to \$26,000 a decrease of \$28,000 over a similar period of the previous year.

The rental received during the five-month period for the use of a portion of the car barn was \$57,500. Taxes and maintenance of the car barn were approximately \$20,500 making a net income from the car barn of \$37,000. If the proposed plan had been in effect during this five-month period, the company would have been unable to meet expenses and taxes by \$11,000, would have been unable to pay any rent for its use of the car barn and would have been unable to meet the interest on its outstanding bonds.

These figures are based on results of operation which do not include any provision for depreciation.

Passenger receipts of this company have been steadily decreasing for a number of years and future results of operation will probably be considerably worse.

It is quite evident that the separation of the car barn property from the other operating property would result in the ultimate discontinuance of service for the 17,000,000 passengers who now find it convenient to use the lines of this company.

[2, 3] The proposed reorganization is, therefore, not only fundamentally unsound in its financial structure but apparently contrary to law in its exclusion of the most important asset of the predecessor company.

Section 151 of the Railroad Law provides:

"Any mortgagee of the property and franchises of any railroad corporation may become the purchaser of the same at any sale thereof under the mortgage, upon foreclosure of advertisement, or under a judgment, or decree, or otherwise and hold and use the same with all the rights and privileges belonging thereto or connected therewith for a period of six months and convey the same to any railroad corporation."

Section 96 of the Stock Corporation Law provides, in part, as follows:

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"When the property and franchises of any domestic stock corporation shall be sold by virtue of a mortgage or deed of trust, duly executed by it, or pursuant to the judgment or decree of a court of competent jurisdiction, or by virtue of any execution issued thereon, and the purchaser, his assignee or grantee shall have acquired title to the same in the manner prescribed by law, he may associate with him any number of persons not less than the number required by law for an incorporation for similar purposes, at least two-thirds of whom shall be citizens of the United States and at least one of whom shall be a resident of this state, and they may become a corporation and take and possess the property and franchises thus sold and which were at the time of the sale possessed by the corporation whose property shall have been so sold upon making and acknowledging and filing in the offices where certificates of incorporation are required by law to be filed, a certificate which shall be entitled and endorsed 'certificate of reorganization of _____, forming _____ pursuant to § 96 of the Stock Corporation Law.'"

Section 96 further specifies the details which must be set forth in the certificate of reorganization under five headings. The fifth of these requirements provides that the number of directors of the reorganized corporation shall not be less in number than those required by law for the old corporation. The section further provides:

"Such corporation shall be vested with and entitled to exercise and enjoy all the rights, privileges, and franchises which at the time of such sale belonged to or were vested in the corporation last owning the property sold, or its receiver, and shall be subject to all the duties imposed by law on that corporation."

It is at least questionable whether, under the provisions of § 151 of the Railroad Law, the purchaser of the property and franchises of a railway company has any right to convey the same to any but a railroad corporation. The provision of law on this subject seems to be mandatory. It is "property and franchises" (not property *or* franchises) which are to be conveyed.

It will be observed that § 96 of the Stock Corporation Law contains similar provisions. The new corporation is to be vest-
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ed with "all the rights, privileges *and* franchises" of the old corporation, and "shall be subject to all the duties imposed by law on that corporation."

[4] The city has received most unfair treatment and should not be subjected to a repetition of that experience. No attempt has ever been made to reimburse it, although other operating expenses were met out of the proceeds of the receivers' certificates. The paving of the streets, in compliance with § 178 of the Railroad Law, is just as legitimate an operating expense as the items of salaries and wages of the officers and employees of a railroad system. The record shows that \$178,000 of the city's claims of \$641,024.41 have been reduced to judgments.

[5] There is no justification for permitting the consummation of a plan that is foredoomed to failure through the withdrawal of the only part of the property that has any revenue value, even if the law permitted this to be done.

The probabilities are that the car barn property, which was valued by this Commission on original cost basis, as of June 30, 1921, at \$1,236,260, after depreciation, and at \$2,428,146 after depreciation at 1921 prices, and which is now probably worth more than the latter figure, will be sold by the certificate holders and if the reorganized company has not by that time ceased operations, there may be no place for the storage of its cars.

If the reorganization committee sees fit to modify its plan by including the car barn property, and thus assure not only storage facilities for the cars but of retaining the present profit from the car barn property, the application will be reconsidered under a modified plan. In its present form it is denied.

Note.—Consolidation, merger, and sale.

- I. In general, 827.*
- II. Jurisdiction, powers, and duties of Commissions, 828.*
- III. Desirability of consolidation and merger, 828.*
- IV. Objections to consolidation and merger, 829.*
- V. Purchase price and terms, 830.*
- VI. Conditions, 832.*

I. In general.

In Re Raymond-Candia Electric Co. D-1073, Order No. 1864, P.U.R.1928B.

Dec. 8, 1926, the New Hampshire Commission allowed a large electric utility to acquire all the property of a small electric utility where the two companies through stock ownership were under the same management and control.

II. Jurisdiction, powers, and duties of Commissions.

The Commission has no jurisdiction to value a water system for the purpose of fixing the price at which it shall be sold. *Re John* (Cal.) Decision No. 17519, Application No. 12616, Oct. 21, 1926.

The California Commission, in *Re Placentia Water Co.* Decision No. 18863, Application Nos. 14037, 14038, Oct. 3, 1927, was asked to authorize the corporate dissolution of a water utility whose assets were to be merged into another utility, and in approving of the physical absorption by the latter, the Commission stated: "It is not necessary for corporations to obtain permission from this Commission to dissolve. Neither does it appear from the evidence that it is necessary that we grant to the Placentia Water Company a new certificate of public convenience and necessity. The order herein will authorize the transfer of the properties and permit Placentia Water Company to operate the same."

In *Re Buffalo, N. & E. Power Corp.* (N. Y.) Case No. 3505, Feb. 23, 1927, in authorizing an electric company to acquire the common stock of another without placing any value upon the property represented by the stock, although the purchase price appeared to be high, Commissioner Pooley stated: "The Commission, as has been pointed out in previous cases, has been given no jurisdiction over holding companies. We may not substitute our judgment for that of the officers and managers of the petitioner as to the wisdom of this transaction. They appear to have given the matter full consideration and to have come to the conclusion that by acquiring the control of this property and its co-ordination with the systems now owned, economies will be effected that will not only be of profit to the public but will justify their purchase of the property. The officers and directors of the petitioner have had great experience in the hydroelectrical developments of this state. The public will not be affected, except favorably, by this unified management."

III. Desirability of consolidation and merger.

In *Re Central Illinois Teleph. Co.* No. 17188, April 21, 1927, the Illinois Commission, in approving the sale of telephone properties for the purpose of consolidation, said that it appeared from the evidence that the financial management and the operation of the properties under the ownership of a single corporation should result in a saving in operating costs, in better and enlarged service to the public, and other public benefits.

The Illinois Commerce Commission, in *Re Illinois Pub. Utility* P.U.R.1928B.

Co. No. 17614, Nov. 23, 1927, approved the application of the petitioner for authority to purchase a municipally owned electric utility of an incorporated village and granted a certificate of convenience to operate the same and to construct transmission lines connecting the system with existing transmission lines of the petitioner. The Commission found that it had jurisdiction of the subject matter and of the parties to the cause and that the purchase would be in accordance with convenience and necessity, which required the continued operation of electrical service in that territory.

In *Re Winona Teleph. Co. (Ind.)* No. 8860, March 23, 1927, in authorizing the sale of a telephone system, Commissioner Wampler said: "The Commission finds that there is sufficient evidence to justify a conclusion of the issues, and that there is no evidence that the change of ownership will result in any detrimental way to the public served, that there is no evidence to substantiate the charge that an increase in rates will follow, but, on the other hand, undisputed evidence was submitted that the purchaser is a successful and competent telephone operator within the state of Indiana, and is perfectly reliable and financially capable of furnishing a plant to take care of any future needs the public might require."

IV. Objections to consolidation and merger.

In *Re Oak Hill Country Club (Ill.)* No. 17160, Oct. 27, 1927, an electric utility applied for authority to purchase an electric transmission line owned and operated formerly by a country club, the purpose of the sale being to obtain greater control over the line and to serve more efficiently. A competitive utility, however, objected to the entry of the order authorizing the sale on the ground that the order of the Commission granting a certificate of convenience and necessity to the applicant had been appealed by the objecting utility and was still pending and undecided on appeal, and further, that to allow the applicant to purchase the property in question from the Country Club would allow it to do indirectly what it could not do directly; that is, to serve in the disputed territory. The Illinois Commission was of the opinion that the application was for authority to purchase a transmission line and not for a certificate of convenience and necessity or for any authority to operate. It was furthermore pointed out that the applicant was willing that any order approving the sale requested should be entered without prejudice to the rights of the objecting utility.

The Indiana Commission, in *Re Associated Teleph. Co.* No. 8712, July 1, 1927, refused a petition of a telephone utility to purchase other telephone properties in the same state where it appeared that the value of the telephone properties sought to be acquired would not be sufficient to justify the issuance of the securities necessary to make P.U.R.1928B.

the purchase and that the financial structure sought to be reared thereby partook largely of the character of a promotion.

In *ibid* the Commission denied a petition of a telephone utility to purchase telephone properties in another part of the state where it appeared that the proposed consolidation would not bring out any good to the communities sought to be served but on the other hand would probably result sooner or later in an increase in rates and more or less confusion in the operation of plant which was then being efficiently and wisely managed.

The Indiana Commission, in *Re Associated Teleph. Co. No. 8770*, July 1, 1927, refused a petition of a telephone utility to purchase other exchanges in the same state where it appeared that the petition for purchase and sale were prompted by the desire to speculate in telephone property and moreover, that the services rendered by each of the telephone operators joining in the petition to sell was already adequate to the demands of his community and equal to the requirements of his patrons and, therefore, no benefit could result to the public by the proposed consolidation.

The Indiana Commission, in *Re Associated Teleph. Co. No. 8796*, July 1, 1927, refused an application by a telephone utility for the purchase of other local exchanges within the state where it appeared in the testimony that the sale and purchase of the property would result in foreign control, largely laid outside of the jurisdiction of the Commission.

V. Purchase price and terms.

In *Re Duncan Utilities Co. Docket No. 3013-E-300*, Decision No. 4243, Dec. 7, 1927, the Arizona Corporation Commission approved the petition of the purchaser of an electrical utility, previously bankrupt and discontinued, to sell the same to another individual, the president of a foreign corporation which could not directly buy a utility for operation in Arizona. The second party was, in turn, given permission to form a local corporation to buy the utility and issue stock sufficient to reimburse him for the purchase price which had to be given to the original purchaser before a certain date for urgent reasons.

The sale of a public utility cannot be authorized without definite information as to the terms of the sale, since the purchase price is a vital factor to be considered in determining whether the purchaser will be financially able to continue the operation successfully. *Re John (Cal.) Decision No. 17519, Application No. 12616*, Oct. 21, 1926.

The California Commission, in *Re Peerless Stages*, Decision No. 18775, Application Nos. 13808, 13837, Sept. 10, 1927, in approving an application of a motor utility to purchase the outstanding P.U.R.1928B.

capital stock of another motor utility doing business within the state required the vendors of the stock to agree to look exclusively to the surplus of the purchasing corporation for the payment of the stipulated purchase price or to contributions by or assessments on stockholders of said company. The Commission said under such a stipulation the vendors could not complain if the date of the final payment should be postponed until the normal and properly allowable earnings of the purchasing corporation amounted to enough to take care of the obligations.

The Illinois Commerce Commission, in *Re Chicago & Joliet Electric Co. No. 17792*, Dec. 21, 1927, approved a joint application for the sale and purchase of a certain electrical distribution system between points within the state and for a certificate of convenience and necessity to the purchaser to operate the same. Although confident of the fact that the evidence submitted in the same seemed to warrant a purchase price in excess of the physical inventory of the property, nevertheless the Commission looked with askance upon a price to be paid widely at variance with the value which might subsequently be found for rate-making purposes, the bases of which values have been definitely set forth by the courts. In limiting the amount to be paid, the Commission stated: "There is no desire on the part of the Commission to stand in the way of the development of any type of public service. It furthermore realizes that many expedients must be resorted to in the development and stabilization of an industry which has been characterized by such tremendous growth as has the electrical business. It, however, appears to the Commission that its primary function is to protect the present interests of the consuming public and, therefore, must insist upon conservative capitalization of property however acquired. In the instant case it appears that an amount of \$175,000 is a maximum valuation for capitalization of property herein acquired and such a finding of value will be hereinafter made."

In *Re West Rock Island County Power Co. No. 17562*, Oct. 11, 1927, the Illinois Commission approved the sale of the entire electric utility property of a company previously owned by its consumers, for the consideration of \$1 in cash and upon the further consideration of the rendition of service by the purchasing power company to the public in all of the territory previously served at any time by the rural utility.

An agreement may be approved for the sale of municipal plants at a price in excess of the value found by the Commission, under a statute indicating that the function of the Commission is to protect the municipality from obtaining an inadequate compensation. *Re Milton (Wis.) U-3410*, July 6, 1926. P.U.R.1928B.

VI. Conditions.

In *Re Rangeley Teleph. Co.* U-904, Dec. 8, 1926, the Maine Commission authorized the sale of the franchises and property of one telephone company to another and stated that to insure the furnishing of safe, reasonable, and adequate facilities by the purchaser, it should, prior to the sale, take proper corporate action binding itself to assume the duties to the public incumbent upon the purchased company.

In *Re Missouri Power & Light Co.* Case No. 5153, July 30, 1927, the Missouri Commission had denied a former application of the owner, D'Arline Holcomb, (P.U.R.1927D, 705) for a certificate of convenience and necessity upon the inspection revealing that the construction did not conform to the National Electric Safety Code, Hand Book No. 3, of the United States Bureau of Standards, which rules and regulations were adopted as the standard by which the Missouri Commission requires such property to be constructed. In the present application the Missouri Power & Light Company asked for permission to buy the existing equipment and rights of the owner and also for a certificate of convenience to authorize the maintenance of said system. The Commissioners were of the opinion that the defects in the system were minor and susceptible to correction without much expense, and in so much as the citizens of Rocheport required electric service immediately, approved the sale of all property and rights of the owner, and issued the certificate subject to the condition precedent that all equipment be rebuilt in conformity with the rules of the United States Bureau of Standards.

NORTH DAKOTA BOARD OF RAILROAD COMMISSIONERS.

W. A. MINOR et al.

v.

M. A. ERICKSON.

[Case No. 2846.]

Certificates of convenience and necessity — Operation in good faith prior to regulation — Electrical construction — Franchises.

1. Negotiations for the construction of a utility and the procurement of a franchise to operate the same prior to the effective date of a regulatory act were held not to be actual construction where there was no evidence of binding contracts made with reference to the construction prior to such date. p. 836.

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Franchises — Power of municipality to grant — Duplication of utility service — Commissions.

2. The authority to grant a franchise, or to grant more than one franchise permitting the use of the streets and alleys by competitive public utilities, is vested in the municipality and not the Commission, p. 839.

Certificates of convenience and necessity — Conditions — Franchises — Electric utility.

3. A franchise from a municipality in which an electric utility proposes to operate, is required as a condition precedent to receiving a certificate of convenience and necessity, p. 840.

Certificates of convenience and necessity — Operation in good faith prior to regulatory act — Electricity.

4. A certificate must be obtained by a utility which has not actually operated its plant prior to the effective date of the regulatory act even though a valid franchise has been obtained from a municipality and the plant actually constructed prior to that date. (§ 1, Chap. 235, Laws of 1927), p. 843.

Constitutional law — Delegation of powers — Power of municipality to grant franchises — Commission control.

5. A statutory provision (Chap. 235, Laws of 1927) requiring a public utility to obtain from the Commission a certificate of convenience and necessity before the construction or operation of any utility plant or system is not an unlawful invasion of the rights of a municipality under a constitutional provision (§ 139, State Constitution) prohibiting legislation allowing the construction or operation of various utilities within a city, town, or incorporated village without the consent of local authorities, p. 843.

Constitutional law — Delegation of powers — Legislative act.

6. The grant of power by the legislature to one subordinate governing body may lawfully be wholly withdrawn by the legislature and reposed by it in some other subordinate body, p. 845.

Commissions — Authority broadened by legislature to meet new conditions.

Discussion of the policy of the legislature, recognizing the necessity for uniform regulation of public utilities, to broaden the Railroad Commission's power to meet these conditions, p. 841

Monopoly and competition — Failure of competition as means of regulation of public utilities.

Discussion of authorities and decisions showing that the theory of competition as a regulator of rates and service of the public utility industry has been generally recognized as ineffective, p. 841.

[November 25, 1927.]

APPLICATION by the operators of electric utility for an order requiring competitive utility to cease operations in certain municipality; granted and order issued.

Milhollan, President: This proceeding is before the Commission on application of W. A. Minor and A. F. McKenzie, hereinafter sometimes referred to as petitioners, asking that the Commission order M. A. Erickson, hereinafter sometimes referred to as respondent, to cease and desist from the construction or operation of an electric public utility plant in the city of Kenmare. Affidavits were filed with the Commission by the petitioners on September 26, 1927. On the 27th day of September 1927, the Commission issued an order requiring the said respondent to cease and desist from constructing a public utility plant and directed him to appear before the Commission at the State Capitol in Bismarck on October 11, 1927, and show cause why he should not be permanently enjoined from proceeding with such construction. The respondent made and filed his return on the order to show cause and the matter came on for hearing at Bismarck on the date above mentioned. The following appearances were entered:

John Thorpe, Minot, and John C. Benson, Minneapolis, Minnesota, Attorneys, appearing on behalf of the petitioners W. A. Minor and A. F. McKenzie; Harold B. Nelson, Attorney, Rugby, appearing on behalf of M. A. Erickson, respondent.

History of Proceedings.

The city of Kenmare is a municipal corporation situated in Ward county, which county is in the northwestern portion of the state. For a long period the city of Kenmare and the inhabitants thereof have been furnished electric current for light, heat, and power by the Montana Dakota Power Company. The latter company generates electricity at central points and distributes it by means of transmission lines to scores of cities and villages in the northwestern portion of the state, including the city of Kenmare and the village of Tolley. One of the petitioners resides at Kenmare and the other at Tolley. The routes, plans and specifications, rates, charges, and practices of the said Montana Dakota Power Company are on file with and have been approved by the Board of Railroad Commissioners.

On or about the 6th day of June, 1927, the city council of said city passed an ordinance granting to respondent, M. A. P.U.R.1928B.

Erickson, a franchise authorizing him to use the streets and alleys for the purpose of constructing, erecting, and operating an electric generating plant and distribution system with which to supply light, heat, and power to the said city of Kenmare. This franchise was duly accepted by the respondent. In addition to the usual provisions, the franchise purports to fix the specific rates which shall be charged to the city and the inhabitants thereof for electric current during the life of the contract.

On July 1, 1927, chap. 235, Session Laws of 1927, became effective. In general this law provides that before beginning the construction or operation of a public utility plant, a certificate of convenience and necessity shall be obtained from the Board of Railroad Commissioners. There are certain exceptions which we need not discuss at this point. Shortly after the first of July, the respondent petitioned the Commission for a certificate of convenience and necessity. The matter was assigned for hearing and was dismissed, without prejudice, upon motion of this respondent.

It is alleged that subsequent to July 1st the respondent began the construction, or erection, of a plant and distribution system in Kenmare without obtaining a certificate of convenience and necessity. It appears that prior to July 1st certain negotiations were carried on looking to the purchase of land upon which to construct a plant. It is contended by respondent that binding contracts were entered into prior to July 1st for the purpose of constructing said plant.

The petitioners allege that the city of Kenmare and surrounding towns are now adequately served and that the construction and operation of a plant by respondent would result in impairment of service and increased rates; that the respondent has received no certificate of convenience and necessity as required by law authorizing him to construct and operate a public utility plant; that the Commission has complete jurisdiction and that the order to cease and desist should be made permanent.

The essential averments contained in the answer of respondent are that the city of Kenmare is a municipal corporation organized under the laws of North Dakota, and that the respondent is now and for years has been a resident-citizen of North P.U.R.1928B.

Dakota and has been for years engaged in the construction and operation of public utility plants; that the city of Kenmare granted a franchise to respondent to use the streets and alleys and that such franchise was duly accepted; that prior to July 1, 1927, the respondent, relying upon the privileges and authority granted to him by said franchise, did begin the construction of an electric light and power plant within the city of Kenmare; that for the reasons set forth the Board of Railroad Commissioners had no jurisdiction of the supposed cause as alleged. The prayer of the respondent is that the proceeding be dismissed and the petition denied. Witnesses appearing on behalf of the respondent offered testimony designed to substantiate their contentions. A copy of the franchise granted to respondent, together with certain correspondence exchanged between the parties were offered and received in evidence.

The Issues.

A careful study of the record and the briefs of the parties to this proceeding shows that there is only one material question of fact upon which there is disagreement. The respondent contends that binding contracts were entered into and construction work commenced prior to July 1st. The petitioners denied this. It is agreed that the respondent was granted a franchise prior to July 1st; that the respondent began the construction of a plant at some date and that he obtained no certificate of convenience and necessity from the Commission. The issue presented to the Commission in this proceeding, then, is whether under the facts shown of record the provisions of chap. 235 of the Laws of 1927 of the state of North Dakota apply to respondent, M. A. Erickson.

[1] It would appear that the first question we must determine is whether the respondent did in fact actually begin the construction of the plant prior to July 1st. This may or may not be material. The record shows that respondent did obtain a franchise by the terms of which he agreed to construct and operate an electric plant. It is also clear that the respondent carried on negotiations with a view of purchasing property upon which to construct a plant, and that negotiations were made

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for the purpose of determining the sizes of poles, transformers, and other equipment that would be required in the construction and operation of a plant. However, the record does not support the contention of the respondent that he entered into binding contracts prior to July 1st (other than the acceptance of the franchise) for the purpose of erecting and constructing a generating plant and distribution system, or that he did any active construction work prior to July 1, 1927. We are, therefore, of the opinion and find that M. A. Erickson, respondent herein, began the construction of a plant at Kenmare subsequent to July 1, 1927.

We must now look to the provisions of Chap. 235 of the Laws of North Dakota to determine the jurisdiction of the Commission. Counsel for both parties have filed briefs and reply briefs fully covering their contentions and arguments.

The power of this Commission to regulate public utility companies was originally conferred by the provisions of Chap. 192, Session Laws of 1919 (§ 4609 c-2, Supplement to 1913 Compiled Laws of North Dakota). This act is very comprehensive and defines in considerable detail the powers and duties of the Commission, also imposing certain obligations upon public utilities. Chapter 235 of the Laws of 1927, which became effective July 1st, requires public utilities to obtain from the Board of Railroad Commissioners a certificate of convenience and necessity before beginning the construction or operation of public utility plants. Sections 1 and 2 are as follows:

Sec. 1. "No public utility, as defined in § 4609c2, Supplement to the 1913 Compiled Laws of North Dakota, shall henceforth begin the construction or operation of a public utility plant or system, or of any extension thereof, without first obtaining from the Board of Railroad Commissioners of this state a certificate that public convenience and necessity require or will require such construction and operation; provided, that this section shall not be construed to require any such public utility to secure such certificate for an extension within any municipality or district within which it has heretofore lawfully commenced operations, or for an extension within or to territory already served by it necessary in the ordinary course of its business."
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ness, or for an extension into territory contiguous to that already occupied by it and not receiving similar service from another utility, or for which no certificate of public convenience and necessity has been issued to any other public utility; but if any public utility in constructing or extending its line, plant or system, unreasonably interferes with or is about to unreasonably interfere with the service or system of any other public utility, the Board of Railroad Commissioners on complaint of the public utility claiming to be injuriously affected may, after notice and hearing, make such order and prescribe such terms and conditions as are just and reasonable.

Sec. 2. "No such public utility shall henceforth exercise any right or privilege under any franchise or certificate hereafter granted, or under any franchise heretofore granted, the exercise of which has been suspended or discontinued for more than one year or if within one year from the granting of such franchise it has not commenced construction under such franchise, without first obtaining from said Board of Railroad Commissioners a certificate that public convenience and necessity require the exercises of such right or privilege."

Section 3 of the above act prescribes the procedure to be followed, providing, among other things, that the Commission may order a public utility to cease and desist from constructing and operating a plant unless it has received a certificate of convenience and necessity.

As above stated the position of the respondent is that Chap. 235 does not apply to him. It is contended that since the franchise was granted and accepted prior to July 1, 1927, the Commission is without jurisdiction. The following reasons are assigned:

(a) The franchise, upon its acceptance, became a contract between the city of Kenmare and the respondent and Chap. 235 did not go into effect until after the making of the contract;

(b) That Chap. 235 is not, by its terms, made retroactive and the presumption is that it is prospective only;

(c) That if made retroactive, it would be in violation of the provisions of the Constitution of the state of North Dakota and P.U.R.1928B.

the Constitution of the United States forbidding the impairment of contracts:

(d) That the provisions of Chap. 235 are not applicable to respondent because the portions thereof sought to be applied in this proceeding are not embraced in the title of the act and that, therefore, such provisions are in violation of § 61 of the Constitution of the state of North Dakota;

(e) That chapter 235 is unconstitutional so far as it attempts to confer upon the Board of Railroad Commissioners the power to determine who may be authorized to occupy the streets, alleys, or public places of any city, town, or village without the consent of the local authorities having control of the same, and to such extent is in contravention of the provisions of § 139 of the Constitution of the state of North Dakota.

[2] Counsel for respondent discusses at some length the provisions above outlined. We are in substantial agreement with the first three contentions. The facts are undisputed that the city granted a franchise to respondent prior to July 1, 1927. This franchise is a valid contract in so far as the parties are competent to contract. That is to say, it is subject to the reserved powers of the state. It is likewise clear that the law is not retroactive. As to paragraph "d" we pass no opinion since it is purely a judicial question. The contention contained in paragraph "e" need not concern us in this proceeding. The granting of franchises permitting the use of the streets and alleys is clearly reserved to the municipality. We have in other proceedings held that under existing laws a municipality may grant two or more franchises if it so desires. As a matter of fact our records show that within the past year certain cities have granted franchises to a second public utility and both are attempting to operate. So we repeat that the matter of granting franchises permitting the use of the streets and alleys by public utilities is one for the municipality and not for the Commission.

Probably the most important question arising in this proceeding is whether the granting and accepting of a franchise prior to July 1, 1927 exempts the respondent from the provisions of Chap. 235. We have found in this proceeding that in our opinion

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ion no construction work was commenced prior to July 1st. The record abundantly supports this finding. We will now consider §§ 1 and 2 of the law in question, these sections relating to jurisdiction.

Counsel for the respondent did not discuss the specific provisions of these sections, but rested his case upon the allegations that under the facts the Commission was without jurisdiction; that if we had, the law was unconstitutional.

Counsel for the petitioners, on the other hand, proceeds to analyze §§ 1 and 2. It is the contention of the latter that the two sections refer to distinct and separate matters except in so far as it relates to the power of the Commission. According to the interpretation of this counsel, § 1 relates to the construction or operation of a plant, while § 2 refers solely to the exercise of a right or privilege under a franchise, such as the right to use the streets and alleys of a city or village.

Conclusions

[3] This is the first formal proceeding that has been brought before us under this statute. Since the conclusions we reach will govern in a measure our future actions, we desire to determine as near as may be possible the intent of the legislature, and consequently our powers and duties as defined by the new law. Since the effective date of this measure we have had scores of applications for certificates of convenience and necessity to operate plants under franchises which were granted prior to July 1st. While these applications were assigned for hearing no objections were made and certificates have been issued. We have informally held that a franchise was required as a condition precedent to receiving a certificate from us and that a certified copy of the franchise must be filed with the application; that a franchise was necessary in order to occupy the streets and alleys of a municipality, but before the utility could begin the construction or operation, or to exercise a right under the franchise it must obtain a certificate from the Board of Railroad Commissioners as required by Chap. 235. There is no showing in this proceeding to justify our reaching a different conclusion.

In our opinion, the legislature has sought to correct a long-P.U.R.1928B.

existing evil, namely, the unnecessary duplication of public utility property and the consequent impairment of service, with resultant increases in rates. The legislature has provided a method whereby the Commission may determine, after hearing, whether public convenience and necessity require the construction or operation of new or additional public utility plants.

The advent of the electric transmission line, extending into all sections of the state and serving entire districts instead of small communities, creates a state problem rather than a purely local one. It is apparent to us that the legislature has recognized the necessity of uniform regulation and has broadened the powers of the Railroad Commission to meet the changed conditions. If the service being furnished to a municipality is inadequate, or unsatisfactory, or the rates exorbitant, the state, through the Commission, may be appealed to. As agents of the legislature, it is the duty of the Commission to cause trained men to analyze the operations of the public utility complained of and the Commission must then determine, after hearing, the rates which should be charged and the service which shall be furnished. This is all accomplished without direct cost to the consumer.

According to the theory of respondent, the municipality, having control of the use of its streets and alleys, should determine not only who shall furnish its citizens with electric light and power, but should also prescribe the rates to be charged. To adopt such a policy would be to return to one of the early and discarded forms of regulation, namely, competition. State regulation was created because of the total or partial failure of the older forms of regulation. Mr. Henry C. Spurr, without question one of the leading authorities on this subject and on public utility law in general, in "Guiding Principles of Public Service Regulation," Volume 1, discusses at great length the various forms of regulation. On page 1 of this work Mr. Spurr says:

"Competition was the earliest form of regulation; but this proved to be bad, in the long run, for the consumers of utility service, as it too often meant duplication of facilities in a field not large or rich enough to support more than one company. The usual outcome of this was consolidation, followed by re-

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coupment, by means of high rates, of losses due to the competition. Whatever may be the value of competition as a regulator of charges in other lines of business, it proved to be a failure in the public utility industry. It was a long time before this was understood, and, even now, it is not generally appreciated by the public."

This question has been before the state and United States Supreme Courts on many occasions. In the third edition of his work entitled "The Law of Public Utilities", Mr. Oscar L. Pond, a recognized authority on public utility law, assigned reasons why state regulation has supplanted competition. At page 923, Mr. Pond makes the following statement:

"The theory of the regulation of municipal public utilities by the state through such a Commission (State Commission) is to avoid competition which is now generally recognized as a needless economic waste and an entirely insufficient method of securing the necessary regulation and control. Under this method the state through its Commission takes the place of competition and furnishes the regulation which competition cannot give, and at the same time avoids the expense of duplication in the investment and operation of competing municipal public utilities," and cites the following authorities in support thereof; *Wood v. Vandalia R. Co.* 231 U. S. 1, 58 L. ed. 97, 34 Sup. Ct. Rep. 7; *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 58 L. ed. 229, 34 Sup. Ct. Rep. 48; *Union Dry Goods Co. v. Georgia Pub. Service Corp.* 248 U. S. 372, 63 L. ed. 309, P.U.R.1919C, 60, 39 Sup. Ct. Rep. 117, 9 A.L.R. 1420; *Public Utilities Commission v. Landon*, 249 U. S. 236, 63 L. ed. 577, P.U.R.1919C, 834, 39 Sup. Ct. Rep. 268; *Pawhuska v. Pawhuska Oil & Gas Co.* 250 U. S. 394, 63 L. ed. 1054, P.U.R.1919E, 178, 39 Sup. Ct. Rep. 526; *San Antonio v. San Antonio Pub. Service Co.* 255 U. S. 547, 65 L. ed. 777, P.U.R.1921D, 412, 41 Sup. Ct. Rep. 428; *Wichita R. & Light Co. v. Public Utilities Commission*, 260 U. S. 48, 67 L. ed. 124, P.U.R.1923B, 300, 43 Sup. Ct. Rep. 51; *Keller v. Potomac Electric Power Co.* 261 U. S. 428, 67 L. ed. 731, 43 Sup. Ct. Rep. 445; *Michigan Pub. Utilities Commission v. Duke*, 266 U. S. 570, 69 L. ed. 445, P.U.R.1925C, 231, 45 Sup. Ct. Rep. 191, 36 A.L.R. 1105; *Buck v. Kuykendall*, 267 U. S. P.U.R.1925B.

307, 69 L. ed. 623, P.U.R.1925C, 483, 45 Sup. Ct. Rep. 324, 38 A.L.R. 286; *Bush & Sons v. Maloy*, 267 U. S. 317, 69 L. ed. 627, P.U.R.1925C, 488, 45 Sup. Ct. Rep. 326.

[4] Section 1 of Chap. 235 appears to us to contain no ambiguous language. It says, in words that appear to be susceptible of but one interpretation, that no public utility shall begin the construction or operation of a public utility plant, or system, or any extension thereof, without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction or operation. Two important exceptions are noted, one in cases where a utility has lawfully commenced operations prior to July 1, 1927, and the other where it seeks to extend its service. We interpret this section to mean that even though a utility may have obtained a valid franchise to operate in a municipality prior to July 1st, and actually constructed a plant it must still obtain a certificate from the Commission if it has not operated such plant prior to July 1, 1927.

With respect to § 2, we are convinced that it deals with an entirely different situation. It would seem to limit the time in which a utility may elect to exercise a right, or commence the construction of a plant. In other words, it speeds up action on the part of the utility. For example, if a utility obtains a certificate, it must commence the construction, or exercise of the rights granted, within one year from the granting thereof, otherwise a new showing of convenience and necessity must be made. We do not think this section is particularly essential to the general purpose sought to be accomplished by the act. Certainly, it does not relate to the matter at issue.

[5] Respondent contends that Chap. 235 of the Session Laws of 1927 is in violation of § 139 of the Constitution of North Dakota; that such section is intended to confer upon municipal authorities the sole and exclusive right to decide whether or not a franchise for the use of its streets and alleys may be granted, and that, the Constitution having granted such power to local authority, the legislature cannot impair or destroy the right which municipalities may have to grant or refuse such franchise, and cites the case of *Western Electric Co. v. Jamestown*, P.U.R.1928B.

47 N. D. 157, 169, 170, 181 N. W. 363, in support of his contention.

We cannot agree with this contention or that it is supported by the case cited. Section 139 of our State Constitution reads as follows:

"No law shall be passed by the legislative assembly granting the right to construct and operate a street railroad, telegraph, telephone, or electric light plant within any city, town, or incorporated village, without requiring the consent of the local authorities having the control of the street or highway proposed to be occupied for such purposes."

An examination of the case cited, we believe, will show that the matter the court had under consideration when it referred to the above constitutional provision and to paragraphs 13 and 24 of § 3599, Compiled Laws of 1913, was the effect of Chap. 192 of the Session Laws of 1919 (the Public Utilities Act) on the then existing law, and that said decision is in this case, no question of rates being involved, authority only for the proposition that said Public Utilities Act did not change or supersede any of the laws theretofore existing with respect to franchises.

We are of the opinion that § 139 of our Constitution does not by its terms constitute an exclusive grant to municipalities of authority over such franchises, and that, even though Chap. 235, Session Laws of 1927, is interpreted as withdrawing some of the theretofore existing powers of municipalities with respect to franchises, it is a lawful withdrawal.

By Article 10, § 7, of the Constitution of Texas, it is provided that "no law shall be passed by the legislature granting the right to construct and operate a street railway within any city, town, or village, or upon any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by said railway." This provision, as will be seen, is almost identical with our own.

In construing this provision of the Texas Constitution the Supreme Court of the United States in the case of San Antonio Traction Co. v. Altgelt, 200 U. S. 304, 307, 50 L. ed. 491, 26 Sup. Ct. Rep. 261, said:

"It is insisted by the plaintiff in error that, under Article P.U.R.1928B.

10, § 7, of the State Constitution, above quoted, the power to grant to street railways the property rights and franchises to construct and operate a street railway within a city, is withdrawn from the legislature, and conferred, if not by express words, then by necessary implication, upon the municipal authorities. We do not so read the section. It merely provides that no such law shall be passed by the legislature, granting the right to construct and operate a street railway, without first acquiring the consent of the local authorities; but we see nothing to prevent the legislature from chartering a street railway, provided such consent be acquired."

[6] No citation of authority, we take it, is necessary on the proposition that a grant of power by the legislature to one subordinate governing body may lawfully be wholly withdrawn by the legislature and reposed by it in some other subordinate body. But by Chap. 235 the power that had theretofore been granted by the legislature to municipal corporations is, at the most, only partially withdrawn, and the consent of the municipality to the use of its streets and alleys for public utility purposes is still required under the terms of the act.

Having carefully considered the testimony in this proceeding, the arguments adduced and the representations made, and being fully advised in the premises, the Commission is of the opinion and finds:

I.

That M. A. Erickson, respondent herein, has commenced the construction of a public utility plant at Kenmare, without having obtained a certificate of convenience and necessity as required by Chap. 235, Session Laws of 1927.

II.

That the said respondent should be ordered to cease and desist from constructing or operating a public utility plant at Kenmare until he shall have complied with the provisions of said Chap. 235 and received a certificate of convenience and necessity as required by law.

An order in accordance with these findings will be entered.
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ORDER.

At a regular meeting of the Board of Railroad Commissioners held at Bismarck, North Dakota, November 25, 1927, all members present, the above matter being before the Commission for determination; hearing having been had pursuant to law, and an investigation having been made into all matters and things involved, all parties having been duly heard, and full consideration having been given to all matters involved, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions, which report is hereto attached, hereby referred to, and made a part thereof, now after due deliberation,

It is *ordered*, that M. A. Erickson, his servants, agents, and employees be and they are hereby required to cease and desist from further proceeding or continuing to proceed with the construction or operation of an electric public utility plant at Kenmare, North Dakota until he shall have complied with the provisions of Chap. 235, Session Laws of 1927, and received a certificate of convenience and necessity as required by law.

PENNSYLVANIA PUBLIC SERVICE COMMISSION.**CITY OF POTTSVILLE***v.***READING COMPANY et al.**

[Complaint Docket No. 6411.]

Crossings — Salvage value of old structures — Street railway.

1. A street railway whose tracks have to be rerouted over a new bridge crossing a railroad is not entitled to the full salvage value of an old structure built by the company but dedicated to the public, since a rerouting of its system which would have rendered unnecessary the use of the old bridge, manifestly would not have given it the right to remove the bridge, p. 849.

Crossings — Salvage value of old structure — Bridges.

2. The difference between the salvage value and the cost of removing an old bridge was apportioned on the same basis as the expense of a new bridge, p. 849.

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Crossings — Expenses due to delay in construction — Wages.

3. An added expense of extra trainmen and watchmen's wages for temporary rerouteing of street cars and a transfer during bridge construction was considered a part of the total expense of the bridge and apportioned to the different parties on the same ratio where such expense was occasioned by delay in the completion of the bridge owing to the lack of co-ordination between the wrecking crew and the erecting crew of independent contractors, p. 849.

[January 16, 1928.]

SUPPLEMENTARY PETITION of a street railway company for special allowances in the cost of construction of a new railroad viaduct as against the shares of expense of a railroad, a utility, and a city; allowances made.

Supplemental Report of the Commission

By the **Commission**: The Commission's order of December 15, 1925, in this proceeding, involving the reconstruction of the bridge and approaches thereto carrying Mauch Chunk street and a single track of the East Penn Electric Company over and above grade of the tracks of the Reading Company in the city of Pottsville, contained, *inter alia*, the following provisions:

"It is *further ordered* that the Reading Company furnish all material and do all work necessary to reconstruct the sub and superstructure of the bridge, including the roadway paving thereon, in accordance with the approved plans, and in addition erect and maintain a safe and adequate temporary foot bridge, not less than five feet in width in the clear over its tracks for the accommodation of the public during the construction period, and in addition contribute any money to which it may be entitled as compensation for damages to any of its property taken, injured, or destroyed, by reason of this improvement.

"It is *further ordered* that the city of Pottsville furnish all material and do all work necessary on the approaches as shown on the approved plans, including the alteration of the retaining wall between the street railway tracks and the vehicular portion of the highway on the east approach.

"It is *further ordered* that the East Penn Electric Company, at its own cost and expenses, relay its street railway track on P.U.R.192SB.

the bridge and approaches in accordance with the approved plans.

"It is *further ordered* that the county of Schuylkill pay to the Reading Company, when and as certified by the Public Service Commission, a sum equal to 25 per cent of the actual cost of the work done and materials furnished by said Reading Company in conformity with this order.

"It is *further ordered* that the East Penn Electric Company pay to the Reading Company, when, and as certified by the Public Service Commission, a sum equal to 25 per cent of the actual cost of the work done and materials furnished by said Reading Company in conformity with this order.

"It is *further ordered* that in addition to the work hereinbefore ordered to be done by it, the city of Pottsville pay to the Reading Company, when and as certified by the Public Service Commission, a sum equal to 25 per cent of the actual cost of the work done and materials to be furnished by said Reading Company in conformity with this order."

The Reading Company completed the work required to be done by it under the said order and thereupon the bureau of engineering of the Commission filed a report on the cost of said work, amounting to \$22,885.32, and recommended that the Reading Company be authorized to bill the county of Schuylkill, city of Pottsville, the East Penn Electric Company, each, for \$5,721.33, being 25 per cent of the said cost. Copies of the bureau's report were served upon the parties. The East Penn Electric Company then filed petition objecting to the statement and the recommendation contained therein and claimed an allowance and deduction from its proportionate share as follows:

1. Salvage value of the old bridge	\$536.92
2. Expenditure for extra trainmen and watchmen for thirty-six days, a period of unnecessary delay in constructing the new bridge	952.92
	<hr/>
	\$1,489.84

From a careful consideration of all the facts, and applicable legal principles, the Commission is of the opinion that the claim as presented by the East Penn Electric Company is devoid of merit.

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[1, 2] The old bridge, although built in 1908 by the predecessors in title of the East Penn Electric Company to replace a structure which had been erected by the predecessors of the Reading Company, was used by the public and in fact dedicated to public use. It formed part of State Highway Route 162 and the highway system of the city of Pottsville.

It was a highway crossing over the tracks of a railroad company which could only be removed, altered, or rebuilt with the approval and subject to the order of this Commission. A change in the operation of the street railway system of the East Penn Electric Company which rendered unnecessary the use of the old bridge, manifestly would not have given the East Penn Electric Company the right to remove the bridge. The manner in which this bridge item of cost has been considered in the report of the engineering bureau, namely a credit of \$536.92, and a debit of \$400, is both equitable and in conformity to law—the net result being that each party is given a credit of one-fourth of \$136.92, the difference between the salvage value and the cost of removing the old bridge.

The claim of \$952.92 is based on an alleged unreasonable delay on the part of the Reading Company in rebuilding the bridge.

[3] During the period of the construction of the new bridge the street railway company's cars had to be rerouted involving a transfer at the side of the bridge and the employment of extra trainmen and watchmen. Under the Commission's order this additional expense was imposed upon the East Penn Electric Company, and if the bridge had been reconstructed without unnecessary delay, the East Penn Electric Company could not have set up a claim for the expense of the additional employees.

The work of removing the old bridge and constructing the new bridge was performed by the Phoenix Bridge Company under contract with the Reading Company. The work was started on October 18, 1926, and completed on December 13, 1926, a period of fifty-seven days. The East Penn Electric Company claims that the work should have been done in twenty-one days and that, therefore, there was an unnecessary delay amounting

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to thirty-six days. The record shows that the work of taking down the old bridge was begun October 18, 1926, and completed on October 24, 1926. The masonry work was started the next day and completed November 7th, but the Phoenix Bridge Company did not begin work on the superstructure until December 3rd and completed that work on December 13th. The actual time consumed on the work was thirty-one days, which under the evidence was the shortest time in which the whole contract could have been completed. The delay was twenty-six days instead of thirty-six days. This delay apparently was due to lack of co-ordination between the wrecking crew and the erecting crew of the Phoenix Bridge Company, an independent contractor liable for any damages growing out of its negligence in the performance of the contract.

The East Penn Electric Company, due to the delay in the reconstruction of the bridge was required to employ extra trainmen and watchmen for a period of twenty-six days at a cost of \$688.22. The question of responsibility and liability is not material nor necessary to determine. In the opinion of the Commission the just and equitable way to dispose of the matter is to consider the extra expense of \$688.22 as part of the cost of the work done by the Reading Company.

An order will issue approving the estimate of cost submitted by the engineering bureau of the Commission, as modified by this report, making the total cost of the work done by the Reading Company \$23,573.54 and authorizing the Reading Company to bill the East Penn Electric Company, county of Schuylkill and city of Pottsville, each, in the amount of \$5,893.38.

Note.—Crossings.

- I. Jurisdiction, powers, and duties of Commissions:*
 - a. Over elimination of grade crossings, §51.*
 - b. Over establishment of grade crossings, §51.*
 - c. Over protection of grade crossings, §51.*
- II. Powers of municipalities, §51.*
- III. Establishing grade crossings, §51.*
- IV. Elimination:*
 - a. In general, §53.*
 - b. Degree of danger, §54.*
 - c. Apportionment of expense, §55.*

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V. Protection:

- a. *Necessity and cost of protection, 855.*
- b. *Particular type of protection, 856.*

I. Jurisdiction, powers, and duties of Commissions.

a. Over elimination of grade crossings.

Once the Commission has apportioned the expense of separation of grades as between parties in interest and has specified the time when payment shall be made, it has no further jurisdiction to compel contribution between the parties, or to require guaranty of the same. *Sidney v. Wabash R. Co. (Ill.) No. 16185, Sept. 14, 1927.*

The Pennsylvania Commission has power to authorize and regulate the manner in which a tramway shall be constructed by a power utility across the right of way and tracks of a railway company. *Re Penn Central Light & P. Co. Application Docket No. 15650, Feb. 8, 1927.*

b. Over establishment of grade crossings.

The Indiana Commission has exclusive jurisdiction to approve or disapprove the opening of highways at grade across the tracks of steam or electric railways. *Cooley Realty Co. v. Cleveland, C. C. & St. L. R. Co. No. 8758, May 20, 1927.*

The passage of a town ordinance although customary, is not a necessary condition precedent to the Board's action upon the application of a railroad for the establishment of a grade crossing, the authority having been conferred upon it by statute to grant its approval when in its judgment conditions justify it. *Re United New Jersey R. & Canal Co. (N. J.) Aug. 4, 1927.*

c. Over protection of grade crossings.

The Missouri Commission has jurisdiction to afford protection for grade crossings constructed prior to the passage of the Public Service Commission Law as well as crossings constructed after such date. *Re Missouri P. R. Co. Case No. 5087, June 27, 1927.*

The Missouri Commission has jurisdiction in regard to the protection of railroad crossings notwithstanding the existence of a city ordinance regulating such matters. *Ibid.*

II. Powers of municipalities.

The Commission has no authority to determine the necessity for a street to cross railroad tracks where the necessity has been determined by the legally constituted city authorities. *Re St. Louis (Mo.) Case No. 4789, March 28, 1927.*

III. Establishing grade crossings.

The Public Utilities Commission of Colorado, in *Re Board of County Comrs. Application No. 979, Decision No. 1495, Nov. 15, P.U.R.1928B.*

1927, disapproved of the opening of a public highway over the right of way of a railroad over what had always been a private farm crossing. The evidence showed that the proposed crossing was very near to other adjacent public highway crossings and that there was no real necessity for the conversion of this farm crossing into a public highway except to a very limited number of people and that the crossing would be of a very dangerous character. Incident to other contentions, the Commission stated: "As to the matter of gates being so limited in width as to prevent the movement of heavy farm machinery over the crossing, or being so heavy as to make their operation difficult or impossible by anyone competent to drive a conveyance over the crossing, this is certainly not a cause for changing the farm crossing into a public crossing. If proper gates are not provided, then it is incumbent upon the railroad company to furnish such gates."

The Illinois Commerce Commission, in *Cicero v. Baltimore & O. C. Terminal R. Co.* No. 17764, Dec. 7, 1927, approved the application of the city for the establishment of a grade crossing where evidence showed that such a change would effect a through and convenient street in a newly developing section, and that the only tracks thereby crossed would be those upon which only local switching train movements were performed, these being guarded by train crews.

Streets indicated on a plat of real estate company applying for the approval of a crossing are shown to be public highways by the dedication of the streets to the public use, the approval of the plats by a city plan commission, and the proper recording thereof under the Indiana statutes. *Cooley Realty Co. v. Cleveland, C. C. & St. L. R. Co.* (Ind.) No. 8758, May 20, 1927.

In *Re Drumm*, No. 8030-474, Oct. 19, 1927, the defendant railroad objected to the establishment of a farm crossing at the point requested by the applicant and suggested that the crossing already provided for his neighbor's farm be changed from its location to the common property line between the applicant and his neighbor, accommodating both parties instead of having two farm crossings within 500 feet. The proposition was objectionable to both neighbors and the Michigan Commission concluded that it was not justified in ordering the farm crossing of the neighbor changed against his consent to accommodate the applicant and a separate crossing was ordered.

The Commission approved the temporary establishment of a railroad crossing at grade where it appeared that, due to sparseness of highway traffic during certain hours, public convenience would not be greatly hampered and where plans were already under way for a permanent relocation of lines. *Re United New Jersey R. & Canal Co.* (N. J.) Aug. 4, 1927.
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*IV. Elimination.**a. In general.*

In Re State Highway Comr. Docket No. 5001, Dec. 22, 1927, the elimination of a grade crossing in advance of actual need therefor was approved in view of the proposed program of the highway department in that vicinity. The Connecticut Commission said: "The Commission recognizes that all grade crossings are dangerous; these particular crossings, however, on account of the topography and lines of sight in the vicinity of the crossings and the limited train operations and highway travel over them, are not especially dangerous and would not be selected for elimination at this time were it not for the highway improvements taking place. Such improvements and the anticipated large increase in highway travel over this highway as a result of such improvements create the necessity for the elimination at this time."

The Illinois Commerce Commission in Re Baltimore & O. C. Terminal R. Co. No. 17248, Dec. 7, 1927, approved an application for permission to maintain reduced clearances in the relocation, rearrangement, and reconstruction of certain tracks in the metropolitan area of the city of Chicago where viaduct construction required the presence of a large number of supporting columns in the switching area which would prove a great inconvenience to certain train movements if the clearance standards were continued.

An underpass rather than a grade crossing should be established for a street crossing an industrial spur track on an embankment, where the average hourly traffic of vehicles on the street was 1631 on Sunday and 786 on a week day and a switch engine operates for six or eight industries for two or three hours each day and also makes special hauls. Re St. Louis (Mo.) Case No. 4789, March 28, 1927.

The Nebraska Commission has refused to approve the complaint of an owner of property adjoining a railroad for the installation by the carrier of a cattle pass under its right of way to connect the grazing fields of the complainant located on either side of the track, notwithstanding a law (§ 5527, Nebraska Compiled Statutes, 1923) providing that the owner of land divided by a railroad is entitled to one adequate crossing. The Commission was of the opinion that any rights which the complainant may have had in that particular kind of crossing were waived by a failure to protest until this late date, the filling up by the carrier of a former cattle underpass in 1902. Evidence showed that a nearby grade crossing was both convenient to the complainant's property and comparatively safe under the circumstances, and that the margin of convenience to the complainant by the construction of a combination underpass and water drain did not justify the expenditure necessary for the maintenance and in-P.U.R.1928B.

stallation. *Pavel v. Chicago & N. W. R. Co. Formal Complaint No. 584, Sept. 26, 1927.*

b. Degree of danger.

The vertical clearance of 21 feet 6 inches established by General Order No. 22 should be maintained in the construction of a viaduct over railroad tracks, where the nature of the railway operation over certain of these tracks is such as to require railway employees on top of the cars in the performance of their duties. *Rockford v. Chicago & N. W. R. Co. (Ill.) No. 15830, Jan. 26, 1927.*

Poor present physical condition being responsible for previous light highway traffic over a crossing, a separation of grades was ordered upon a showing that prospective improvement of the highway under a state aid program would result in heavier traffic thereon. *Sidney v. Wabash R. Co. (Ill.) No. 16185, Sept. 14, 1927.*

A subway 18 feet wide with obstructed views which could not be approached with safety at night at a speed exceeding 15 miles an hour was held to be in an unsafe condition for the ordinary uses of the highway by the public where it appeared that the automobile traffic was heavy. *McMahon v. Nickel Plate Road (Ind.) No. 7964, March 18, 1927.*

A plan for eliminating a dangerous 18-foot subway by a diversion of the highway so as to approach the crossing at right angles is impracticable if the distance between the subway and the curve in the highway approaching it is less than 150 feet. *Ibid.*

The reconstruction of a narrow dangerous subway even at a much greater cost is preferable, from the standpoint of public benefit, to the diversion of the highway so as to establish a right angle approach to the subway. *Ibid.*

After a careful consideration of the record in an application for the abolition of a grade crossing, the Pennsylvania Public Service Commission, in *Ferndale v. Baltimore & O. R. Co. Complaint Docket No. 7059, Dec. 12, 1927*, was not persuaded that the elements of danger presently existing at the crossings in question would justify the abolition at large expense by the proposed plan, although the evidence disclosed that the crossings were subjected to both local and through traffic. It also conclusively showed that the respective movement of trains developed a condition of comparatively small danger. The Commission stated: "The evidence shows that it would be unwise to abolish either of the crossings without at the same time abolishing the other, due to their proximity on either bank of the river, and that the adoption of any plan for the abolition of both crossings will also involve the reconstruction of the highway bridge over Stonycreek river and subject the county, city, and borough to large expenditures." *P.U.R.1928B.*

The construction of an aerial tramway of a power utility to carry coal from the mines to the power plant, was held to be necessary for the service, accommodation, convenience, and safety of the public in view of resulting economies and efficiencies. *Re Penn Central Light & P. Co. (Pa.) Application Docket No. 15650, Feb. 8, 1927.*

c. Apportionment of expense.

A city which has, by constructing a high level bridge across a river along one bank of which there are railroad tracks, predetermined the necessity for a viaduct over these tracks and has also precluded a change in the character of the neighborhood from an industrial to a retail district from which the tracks might later be eliminated, must bear the burden of the cost of the viaduct, if the railroad receives no benefit therefrom. *Rockford v. Chicago & N. W. R. Co. (Ill.) No. 15830, Jan. 26, 1927.*

A railroad company will not be relieved from paying one half the cost of an underpass crossing by a street on the theory that such a crossing is of no benefit to it, since every elimination of a grade crossing lessens the probability of damages and permits free and unhampered operation of the line. *Re St. Louis (Mo.) Case No. 4789, March 28, 1927.*

In *State Highway Commission v. Missouri P. R. Co. Case No. 4146, Nov. 6, 1927*, the matter before the Commission upon petition of the defendant was an interpretation of the report and order made in the same cause at a previous hearing. The order had stated that a reasonable apportionment of the cost of a subway underpass would be to assign one-third to the carrier and the balance to the highway commission, but no specific mention was made of the cost of approaches and drainage. The highway commission later offered to share one-half of these incidental costs, whereupon the carrier refused to pay more than one-third. The Missouri Commission held that unless specifically exempted, the approaches and drainage are a proper part of the cost of separation of grades, and should be included in the amounts apportioned to each of the interested parties.

V. Protection.

a. Necessity and cost of protection.

In *Re Western P. R. Co. Decision No. 18683, Application No. 13681, Aug. 4, 1927*, the California Commission was of the opinion that the operation of the spur track of the applicant on a certain city street presented an unreasonable hazard of accidents by reason of unauthorized impaired side clearances and ordered that said track should not be used for operation of engines or cars until standard clearance should be established.
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The Illinois Commission in *Papineau v. Chicago & E. I. R. Co.* No. 17429, Oct. 11, 1927, approved the complaint of a village against the hazardous character of two grade crossings of the railroad company within its limits and ordered the installation of an electric flashing safety device with a bell at the most used crossing and a warning bell at the other which, evidence showed, was used about half as much as the first.

In *Re Pennsylvania R. Co.* No. 17923, Jan. 11, 1928, the Illinois Commerce Commission was of the opinion that certain interlocking protection afforded at an intersection of the petitioners' railroads at grade could be discontinued without sacrificing the ordinary elements of safety for which interlocking protection is usually installed at such crossings, provided that all of the petitioners' trains were brought to a full stop before passing over the crossing, in view of the fact that the crossing had a high degree of visibility in all directions.

Upon a showing that the expense of installing a signal at a grade crossing previously ordered by the Michigan Commission in *Re Maybee*, No. 7077-377, Dec. 14, 1927, on a 50-50 expense basis between the railroad and the county was greater than the contemplation by the county officials, the latter objected to the installation of the same and stated that rather than pay the amount necessary they would withdraw their complaint as to the hazardous condition of the crossing. The work was accordingly ordered stopped and the complaint withdrawn.

The Michigan Commission, in *Re Sturgis*, No. 7077-209, Nov. 29, 1927, thought that two train movements a day over a grade crossing during which the train crews guarded the way in advance was not sufficient to warrant the maintenance of a watchman, and the carrier was allowed to discontinue the same provided trains were brought to a full stop and the crossings guarded by train crews on each movement.

b. Particular type of protection.

The standard banner for wig-wag warning signals at railroad crossings should be painted red rather than black and white. *Re Standards for Protection of Crossings of Highways* (Cal.) Decision No. 17866, Case No. 2922, Jan. 12, 1927.

The Commission allowed railroad trains to proceed across a crossing of two railroads in the city of Indianapolis at the speed of 15 miles an hour upon the installation by the railroads of certain approved automatic safety devices, including interlocking signals. *Re Pennsylvania R. Co. (Ind.)* No. 8992, Aug. 19, 1927.

In *Re Lawton*, No. 2641, Oct. 26, 1927, the Michigan Commission P.U.R.1928B.

sion believed that the operation of safety gates for twenty-four hours at a grade crossing as sought by the plaintiff was not as efficient and conducive to safety as a track circuit flashing signal. The Commission accordingly ordered the installation of the same, stating: "On account of crossing alarm bells having generally proven inadequate protection at highway crossings of railroads since the advent of the closed automobile, the Commission has concluded that for the greater protection of traffic on Furnace street, that it is necessary that track circuit flash light signals be maintained at this crossing to warn traffic of the approach of main line trains instead of the crossing alarm bell now maintained."

The installation of flash light signals in lieu of gates and watchmen at railroad crossings was authorized for a trial period of thirteen months. Re Missouri P. R. Co. (Mo.) Case No. 5087, June 27, 1927.

PENNSYLVANIA PUBLIC SERVICE COMMISSION.

SCRANTON TAXICAB COMPANY et al.

v.

MICHAEL J. FLANAGAN.

[Complaint Docket No. 7415.]

PUBLIC SERVICE COMMISSION

v.

MICHAEL J. FLANAGAN.

[Complaint Docket No. 7424.]

Certificates of convenience and necessity — Operation in good faith prior to regulation — Seizure by replevin.

The seizure and sale of motor bus equipment by a sheriff and a resumption of service by the purchasers thereof under authority of the Commission, was held to cause a break in the continuity of service originating prior to regulation by the first operator; and operations commenced by him three months later without permission of the Commission were declared unlawful.

[January 16, 1928.]

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COMPLAINT against alleged illegal operation by a taxicab operator; operator ordered to cease.

By the **Commission**: It being conceded by the respondent, Michael J. Flanagan, that he is operating as a common carrier of passengers in call and demand service in Scranton without a certificate of public convenience from this Commission approving such operation, the issue raised by the above complaint and the investigation of the Public Service Commission on its own motion, relate simply to the question whether or not he was engaged in such business on January 1, 1914, the effective date of the Public Service Company law, and continuously since that time.

Respondent testified that he began operation by motor vehicles in 1912, with one taxicab, and that from 1915 or 1916, his business was known as the Laurel Line Taxicab Company, operating from the Laurel Line Station in Scranton. In 1920 or 1921 the five or six cabs used by him in this business were seized by the sheriff under a writ of replevin and sold. Respondent's own testimony as to the exact date of this seizure is somewhat contradictory, but from the entire record it appears to have been either in October, 1920, or March, 1921. The record shows that the buyers of the cabs at the sale continued in business as the Laurel Line Taxicab Company, operating from its old location at the Laurel Line station.

Subsequent to the seizure of his cabs, respondent secured another cab and began business anew. His testimony as to the period which elapsed before his return to active operation is not consistent with that of his own witnesses and is contradicted by the complainants. The Commission finds that a period of at least three months intervened before respondent began to operate in his new business. Since the seizure, the name under which Flanagan had operated, as well as the stand maintained by him, has been carried on by the purchasers of his facilities at that time, and since then Flanagan has operated and advertised his business, again grown to require six cabs, under his own name and at an entirely different location.

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To enable respondent to sustain his position that he is not required to obtain a certificate of public convenience from this Commission before engaging in public service, it is necessary that it appear that he has continuously, since the effective date of the Public Service Company Law, carried on the service in which he was then engaged. It appears, however, on the contrary, that about 1921 respondent's business as the Laurel Line Taxicab Company ceased to exist and was taken up by a new organization, incorporated and approved by this Commission to carry on respondent's former service, and that after an interval, the exact length of which is in dispute, respondent began a new business, at a new stand and under a different name, entirely independent of the former business in which he had been engaged from 1914 to that time. Respondent is clearly not engaged in the same business in which he was engaged before 1921, or rendering the same service to the public.

In the light of these facts the Commission finds that the respondent was not engaged in his present business upon the effective date of the Public Service Company Law, or continuously since that time. There being no denial that respondent is now operating as a common carrier of passengers by motor vehicle, in call and demand service, an order will issue requiring respondent to cease and desist such operation unless and until he shall have obtained a certificate from this Commission in approval thereof.

RHODE ISLAND PUBLIC UTILITIES COMMISSION.

RE INTER-CITY COACH COMPANY, INCORPORATED.

[No. 766, Order No. 1204.]

Interstate commerce — Commission jurisdiction over motor busses.

1. The Commission has no power to interfere with the motor bus operations of an applicant for a certificate of convenience and necessity confined to the transportation of passengers between terminals in different states, p. 862.

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Interstate commerce — Presumption in favor of strictly interstate operation.

2. It is the duty of the Commission to assume that an applicant for a certificate of convenience and necessity for an interstate route intends to confine itself to engaging interstate commerce, p. 863.

Interstate commerce — Protection of state commerce — Busses.

3. Granting an application for a certificate of convenience and necessity for a proposed interstate bus route with certain specific conditions deemed necessary to protect legitimate intrastate commerce from invasion does not create an undue burden on interstate commerce, p. 863.

[November 12, 1927.]

APPLICATION of motor utility for certificate of convenience and necessity; granted with restrictions.

Appearances: Roy C. Farnum, for the applicant; Eugene J. Phillips, for The New York, New Haven & Hartford Railroad Company and the New England Transportation Company; Alonzo R. Williams, for the United Electric Railways Company.

By the **Commission**: This is an application of Inter-City Coach Company, Inc., for a certificate to operate five or more jitneys between the city of Providence, Rhode Island, and the city of Attleboro, Massachusetts, over a route described in the application as amended, as follows, viz.: "Beginning at the bus stand on Francis street (Providence), thence along Francis street to Stillman to Gaspee to Smith to Charles to Randall to North Main to Pawtucket city line thence along North Main street to West avenue to Main street to Dexter to Railroad avenue to Exchange street to Broadway to State line. Return over same route in Rhode Island, as far as Charles street in Providence, thence to North Main street to Steeple street to Canal street to Post Office square to Exchange place to Terminal on Francis street. Proposed route in Massachusetts: Beginning at the State line at Washington street, thence along Washington to Mendon road, thence along Mendon road to Robinson avenue, thence along Robinson avenue to Highland avenue; thence along Highland avenue to Newport avenue, thence along P.U.R.1928B.

Newport avenue to South avenue, thence along South avenue to County, thence along County to Bus terminal, Attleboro. Returning over same unless business is better on some other street."

The applicant is the holder of Certificate No. I-190, previously issued on April 27, 1927 to Arthur E. Farnum, Senior, father of Roy C. Farnum, and by him transferred to the applicant on May 24, 1927, covering interstate operation between Woonsocket, Rhode Island and Attleboro, Massachusetts via South Attleboro. From the intersection of Robinson street and Highland avenue the route into Attleboro coincides with the route proposed by the present applicant.

The applicant on May 25, 1927, filed an application (No. 738) for operation between Providence and Attleboro, similar to the present application, except that the route traversed Washington street to Newport avenue instead of Washington street, Mendon road, Robinson street and Highland avenue to Newport avenue, in what is known as South Attleboro, Massachusetts. It appearing from the testimony that applicant intended to engage in through operation between Providence and Woonsocket, via South Attleboro, without going to the city of Attleboro, the application was denied by the Commission under date of June 8, 1927, in Re Inter-City Coach Co. No. 738, P.U.R.1927E, 421.

Thereupon the applicant filed a suit in equity in the District Court of the United States for the District of Rhode Island, seeking to enjoin the Commission and other state authorities from any interference with his proposed operation.

The case was heard on June 21, 1927, before three judges (Anderson, Circuit Judge, and Morton and Lowell, District Judges) and, in an opinion by Morton, Judge, preliminary injunction was denied. Upon rehearing, the same Court, under date of October 4, 1927, denied the issuance of an injunction and dismissed the bill, "but without prejudice to the plaintiff's right to apply to the Rhode Island authorities for permits applicable to its proposed route, and to his right to bring another suit if such permit shall be refused."

(Inter-City Coach Co. v. Atwood, 21 F. (2d) 83.)
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Applicant filed his present application October 11, 1927, and the same was heard on November 2, 1927.

The fact is undisputed that there is a legitimate movement of passengers in interstate commerce between Providence and Pawtucket, Rhode Island and Attleboro, Massachusetts, whether such traffic proceeds over Washington street to Newport avenue and thence on to the city of Attleboro, or whether it is routed to the same destination over Washington street, Mendon road, Robinson street, Highland avenue and thence over Newport avenue to Attleboro, as defined in the route of the applicant.

[1] The Commission has no power or desire to interfere with the applicant in an operation confined to the transportation of passengers between Providence and Rhode Island points, and Attleboro and Massachusetts points. Certificates have already been granted to five applicants, who are now engaged in the operation of a large number of busses between these points. Nor has the Commission any desire to interfere with the interchange of passengers at the corner of Highland avenue and Robinson street between the Providence-Attleboro busses and the Woonsocket-Attleboro busses of the applicant, provided that the applicant does not interfere improperly with the intrastate business between the cities of Providence and Woonsocket by advertisement and solicitation of patronage in such a manner as to indicate that applicant is engaged primarily in the operation of through busses between said cities, and that the operation to Attleboro is a mere incident to such primary purpose.

Applicant takes the position that the Commission has no right or power to concern itself with its route outside of the state of Rhode Island, and that it may adjust or readjust such route outside of the state to suit its own purposes or ends, regardless of the effect thereof upon the intrastate commerce of Rhode Island.

There can be little doubt as to what the applicant desires to do. This is indicated by the testimony of Roy C. Farnum at this and previous hearings. It is desired to secure bus traffic between Providence and Woonsocket, Rhode Island, under the guise and protection of interstate commerce.

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In the decision denying the former application the Commission set forth the entire length of the route therein applied for as 21.76 miles, 3.30 miles of which was in Massachusetts and 18.46 miles in Rhode Island, and showed that by making use of Robinson street and Mendon road, the total distance could be shortened by one mile to 20.76 miles and the portion in Massachusetts reduced to 2.30 miles, whereupon the applicant adopted the shorter route in its testimony before the District Court, and now adopts the same route for the purposes of this application.

[2, 3] In the light of the principles established by the opinion of the District Court, we believe it our duty to assume that the applicant intends to confine itself to engaging in interstate commerce as defined in said opinion, but we also believe that it will constitute no undue burden on interstate commerce, if we grant the application with certain specific conditions, which we deem necessary to reasonable protection against invasion of the legitimate intrastate commerce of this state.

After hearing the said application, the introduction of testimony and arguments of counsel, and for the reasons heretofore set forth, it is

Ordered that the application of Inter-City Coach Company, Inc., for a certificate of the Commission authorizing the operation of jitneys over the following route between Providence, Rhode Island, and Attleboro, Massachusetts:

"Beginning at the bus stand on Francis street; thence along Francis street to Stillman to Gaspee to Smith to Charles to Randall to North Main to Pawtucket city line; thence along North Main street to West avenue to Main street to Dexter to Railroad avenue to Exchange street to Broadway to State line. Return over same route in Rhode Island as far as Charles street in Providence; thence to North Main street to Steeple street to Canal street to Post Office square to Exchange place to terminal on Francis street.

"Proposed route in Massachusetts: Beginning at the State line at Washington street; thence along Washington to Mendon road; thence along Mendon road to Robinson avenue; thence along
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Robinson avenue to Highland avenue; thence along Highland avenue to Newport avenue; thence along Newport avenue to South avenue; thence along South avenue to County; thence along County to Bus terminal, Attleboro. Returning over same route;" be and the same is hereby granted.

This certificate is issued upon the express conditions:

1. That any and all busses operated by the petitioner by virtue thereof shall operate only on through trips and over the route designated therein between the terminus designated in the city of Providence, Rhode Island and the city of Attleboro, Massachusetts.

2. That no busses shall be operated by the petitioner, whether under this certificate or under Certificate No. I-190 previously issued to the petitioner for operation between Woonsocket, Rhode Island and Attleboro, Massachusetts, as through busses between Providence, Rhode Island and Woonsocket, Rhode Island.

3. That the petitioner shall refrain from any and all advertisement or solicitation by itself or its agents, whether at its terminals in Providence or Woonsocket, Rhode Island, or elsewhere, which would indicate that the petitioner offers to transport passengers between the cities of Providence and Woonsocket, Rhode Island, excepting, however, advertisement or solicitation in substantially the following form, "Providence to Attleboro, (if by advertisement, in large letters), connecting for Woonsocket at South Attleboro (if by advertisement, in smaller letters), and "Woonsocket to Attleboro (if by advertisement, in large letters), connecting for Providence at South Attleboro," (if by advertisement, in smaller letters).

4. That said certificate shall become subject to revocation upon violation of any of the above conditions.

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1. One of the rights incident to private ownership is the keeping of accounts, not solely for the purpose of establishing a basis for fixing rates, but for such other matters as appertain to the ordinary business of a utility corporation. *Passaic Consol. Water Co. v. Public Utility Comrs.* (N. J. Sup. Ct.) 242.

2. The Board of Public Utilities under a law (§ 17, P. L. 1911, p. 378) providing that it shall have power to require every utility to keep intelligible accounts, has no authority to order the revision of the books of a company as to its capital account or to forbid it from setting up any other or different basis of fixed capital than that approved by the Board. *Passaic Consol. Water Co. v. Public Utility Comrs.* (N. J. Sup. Ct.) 242.

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APPEAL AND REVIEW.

1. Courts reviewing orders and decisions of the Commission as to reasonableness of its conclusions will examine the facts upon which the order is based, and, if there is substantial evidence to support it, the order will be sustained. *Chicago & N. W. R. Co. v. Illinois Commerce Commission* (Ill. Sup. Ct.) 153.
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2. The rule that the court will not hear evidence to review findings of fact made by the Public Utilities Department does not forbid the presentation of evidence to establish a petitioner's right of review where there has been no finding of fact material to it. *New England Teleph. & Teleg. Co. v. Department of Public Utilities* (Mass. Sup. Jud. Ct.) 396.

3. The court on review is not bound by the decision of the Commission that evidence is immaterial and can give it due weight where there is nothing to suggest that fuller or more convincing evidence than was introduced before the Commission is sought to be presented to the court. *New England Teleph. & Teleg. Co. v. Department of Public Utilities* (Mass. Sup. Jud. Ct.) 396.

4. A contention by a telephone utility, in moving to have an order granting a certificate to a rival company to operate a city exchange set aside, that it was not advised when application had been filed by a second company and that it had no notice of hearing, was overruled where it was not explained why the first company should have remained uninformed as to unsatisfactory service conditions in the territory that had resulted in the granting of a franchise to the second company, concerning which the first company had been notified in ample time to contest the same. *Re Missouri City Teleph. Co. (Mo.)* 810.

5. A suggestion in a brief filed for an industry appealing a judgment dismissing its suit against a railroad for expense of side track maintenance that the carrier is liable for the amount expended for such repairs by reason of orders of the Director General of Railroads, issued during Federal control, was held not properly before the court in the absence of any pleading of evidence in support of the contention on the record. *Mills v. Norfolk Southern R. Co. (N. C. Sup. Ct.)* 373.

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7. Findings of a trial court not questioned upon the argument of the case, nor challenged as being unsupported by evidence by any assignment of error, cannot be properly so questioned or challenged for the first time upon appeal although the court may, in view of the importance of the question, consider and decide it as if properly raised and presented. *Pabst Corp. v. Milwaukee (Wis. Sup. Ct.)* 503.

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Disapproval of reorganization plan whereby real estate corporation will take over car-barn property yielding substantial net income in rentals and depriving system of its car barns, see **CONSOLIDATION, MERGER, AND SALE**, 11.

CARRIERS.

Motor carrier service in interstate commerce, see **INTERSTATE COMMERCE**.

CERTIFICATES OF CONVENIENCE AND NECESSITY.

I. In general, 1-3.

II. Necessity for securing, 4-8.

III. Local consent, 9, 10.

IV. Grounds for granting or refusing, 11-13.

V. Evidence of necessity, 14, 15.

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VII. Choice of applicants, 24.

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CERTIFICATES OF CONVENIENCE AND NECESSITY—*continued*.*I. In general.*

Consideration of notice to telephone company on review of order granting certificate to rival company, see *APPEAL AND REVIEW*, 4.

Requirement that utility obtain permit from Commission before entering community not theretofore occupied by it as not unconstitutional, see *CONSTITUTIONAL LAW*, 1.

Grant of powers to Commission with respect to certificates of convenience and necessity before construction of plant as not unlawful invasion of rights of municipality under constitutional provision relating to delegation of powers to subordinate bodies, see *CONSTITUTIONAL LAW*, 2, 3.

Extent of Commission power to aid acquisition of private utility by city, see *MUNICIPAL PLANTS*, 1.

Filing of opposing application for certificate to operate motor busses over substantially same territory as that served by street railway as admission of force of position taken by another applicant that street railway service is inadequate, see *SERVICE*, 15.

Annotation on certificates of convenience and necessity, p. 674.

Annotation on consent of other governmental bodies than Commission, p. 675.

Annotation on scope of certificate, p. 678.

Annotation on certificates for irregular operation, p. 679.

Annotation on assignment and sale of certificate, p. 680.

Annotation on procedure relating to certificate, p. 680.

1. All water and electric corporations exercising or contemplating the exercise of any right or privilege under any franchise or permit relating to the development of hydroelectric energy within the state of Arizona without having obtained a certificate were ordered forthwith to file with the Commission applications for such certificates as provided by the Constitution and the rules of the Commission. *Re Electric and Water Corporations (Ariz.)* 774.

2. The failure of the Commission to deny a certificate because of prior illegal operation does not legalize an operation made unlawful by statute. *Re Pless and Davis (Colo.)* 783.

3. Full compliance with the law of a state requiring a certificate to do interstate business does not carry with it the right to haul intra-state passengers on the exclusive interstate busses. *Re Pickwick Stages System (Mo.)* 1.

II. Necessity for securing.

See *INFRA*, 21.

Jurisdiction to safeguard public rights in regard to water powers, see *WATER POWERS*, 1-3.

4. An occasional trip of a taxicab operator, usually operating within a certain city, beyond the limits of such a city in order to deliver passengers, does not bring him within the provisions of an act placing the operation of motor carriage for hire between cities and towns within the regulatory jurisdiction of the Commission. *State v. Haynes (Ark. Sup. Ct.)* 650.

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CERTIFICATES OF CONVENIENCE AND NECESSITY—*continued.*

5. The operator of a sight-seeing bus in commencing his tour from a certain point and making a circuit of points of scenic interest without touching cities or towns, always terminating in the place of origin, does not thereby come within the provisions of an act (Acts of 1927, p. 257, § 1) providing for the regulation by the Railroad Commission of motor carriage between cities and towns. *State v. Haynes* (Ark. Sup. Ct.) 650.

6. The operation of taxicabs from a hotel in a city to a golf course about three miles outside of the corporate limits thereof with no intervening cities or towns does not come within the provision of an act (Acts of 1927, p. 257, § 1) providing for the regulation by the Railroad Commission of motor carriage between cities and towns. *State v. Haynes* (Ark. Sup. Ct.) 650.

7. The inauguration of vehicular transportation by a ferry company previously authorized to carry passengers, within the provisions of an act (Stat. 1923, p. 836) exempting from the requirements of obtaining a certificate, ferries operating in good faith prior to the Public Utility Act (§ 50[d]), is not such a new service as would require an application for a certificate of convenience and necessity therefor. *Golden Gate Ferry Co. v. Railroad Commission* (Cal. Sup. Ct.) 463.

8. A ferry utility, possessed of the right to operate vessels between given points, under an exemption of the Public Utilities Act, (§ 50 [d] amended by Stat. 1923, p. 836) allowing the operation of ferries in good faith prior to the effective date of the regulatory act without a certificate, may properly amend tariff schedules on file so as to cover commodities not theretofore transported. *Golden Gate Ferry Co. v. Railroad Commission* (Cal. Sup. Ct.) 463.

III. Local consent.

See also *infra*, 13.

9. A franchise from a municipality in which an electric utility proposes to operate, is required as a condition precedent to receiving a certificate of convenience and necessity. *Minor v. Erickson* (N. D.) 832.

10. A statute (§ 194.11 subsec. 2) providing that no auto transportation company shall operate within or through any municipality without Commission consent does not impose any condition precedent upon the issuance of a certificate by the Commission but only upon operation under such certificate. *Re Auto Transp. Co.* (Wis.) 439.

IV. Grounds for granting or refusing.

Annotation on reasons for granting or refusing certificate, p. 676.

Annotation on character of applicant as affecting granting or refusing of certificate, p. 677.

11. A certificate for the operation of a gas utility should not be denied on the ground that a private company in taking over a gas system previously constructed and operated by a municipality has functioned without authority for an unavoidable interim between the change of management and the subsequent formal grant of Commission permission, because of the indispensable public need for the continuity of service. *Re Pacific Gas & E. Co.* (Cal.) 672.
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CERTIFICATES OF CONVENIENCE AND NECESSITY—*continued.*

12. A certificate was granted to an applicant admittedly operating without authority prior to hearing in view of the general ignorance of motor carriers throughout the state concerning the law or the rules and regulations adopted by the Commission pursuant to the law governing their operations and in further view of the need of the public, the duration of actual operation, and the good faith of the operator. *Re Pless and Davis (Colo.)* 783.

13. The Commission should not grant a license for the operation of motor vehicles for hire through a town against the express wishes of the local authorities unless there are impelling circumstances that required such action. *Re Hart (Mass.)* 523.

V. Evidence of necessity.

Annotation on evidence of necessity, p. 677.

14. Both necessity and convenience are required elements in an application for a certificate and the absence of either one is fatal. *Re Billings-Sheridan Bus Line (Mont.)* 816.

15. A certificate to operate a motor utility was refused where the only evidence of necessity was a petition signed by the inhabitants along the proposed route, which did not purport to state that present rail service was inadequate, but only asserted that the new service would be more convenient. *Re Billings-Sheridan Bus Line (Mont.)* 816.

VI. Operation in good faith prior to regulation.

Annotation on operation in good faith prior to regulation, p. 674.

16. A ferry company operating more than one route by virtue of an exemption in favor of utilities operating in good faith prior to the regulatory act, may file tariffs for the transportation of vehicles on one of its routes, on which alone it had previously transported only passengers or had regular filed tariffs for such service. *Golden Gate Ferry Co. v. Railroad Commission (Cal. Sup. Ct.)* 463.

17. A provision of the act (Rev. Stat. 66-131) interpreted, and it is held that a utility that was doing business in the state when the act was passed, and is proposing to enter a community not theretofore occupied by it, must obtain from the Commission a permit to do so and may be required to conform to reasonable regulations of the Commission in respect thereto. *Kansas Gas & E. Co. v. Public Service Commission (Kan. Sup. Ct.)* 492.

18. An applicant for a certificate of convenience and necessity seeking the protection of a law (Act 292, Louisiana Laws of 1926) providing for the automatic issuance of a certificate to applicants operating in good faith prior to the passage of the act has the burden of affirmatively establishing that his previous operations were of the same character, on regular schedule, and between the same termini as those contemplated by his application. *Ex parte Dawson (La.)* 181.

19. A certificate of convenience and necessity was awarded as a matter of right, in the absence of evidence overcoming the legal presumption of public convenience and necessity, to two applicants who proved actual operation in good faith and the rendition of satisfactory and dependable P.U.R.1928B.

CERTIFICATES OF CONVENIENCE AND NECESSITY—continued.

service by motor vehicles prior to the effective date of the Motor Bus Regulation Act (1927, § 11). *Re McCartney (Mo.)* 525.

20. Negotiations for the construction of a utility and the procurement of a franchise to operate the same prior to the effective date of a regulatory act were held not to be actual construction where there was no evidence of binding contracts made with reference to the construction prior to such date. *Minor v. Erickson (N. D.)* 832.

21. A certificate must be obtained by a utility which has not actually operated its plant prior to the effective date of the regulatory act even though a valid franchise has been obtained from a municipality and the plant actually constructed prior to that date. (§ 1, Chap. 235, Laws of 1927.) *Minor v. Erickson (N. D.)* 832.

22. The seizure and sale of motor bus equipment by a sheriff and a resumption of service by the purchasers thereof under authority of the Commission, was held to cause a break in the continuity of service originating prior to regulation by the first operator; and operations commenced by him three months later without permission of the Commission were declared unlawful. *Scranton Taxicab Co. v. Flanagan (Pa.)* 857.

23. It was believed that the intention of the legislature in seeking to prevent any unfairness incident to the establishment of motor transportation regulation by providing that operators lawfully functioning under a certificate on a set date should be entitled to authorization would be carried out by construing such laws with great liberality, and certificates were accordingly granted to applicants established and actually operating on such a date, although through ignorance of the law they were in fact not formally authorized at that time. *Re Auto Transp. Co. (Wis.)* 439.

VII. Choice of applicants.

Annotation on preference between applicants, p. 677.

24. The application of a motor utility operator already successful in other territory to substitute his service for that of an interurban railway company, proven to be inadequate, was preferred to the application of the railway company itself to substitute busses over its own lines. *Re Jewett (Vt.)* 225.

VIII. Limitations and conditions.

Annotation on conditions and restrictions, p. 678.

25. Two applicants not having a partnership or corporate relation between them for certificates of convenience and necessity, each owning a separate fleet of busses and operating over the same route under the joint name of "Albatross Coach Line" in accordance with a private agreement were granted certificates with the restriction that in the absence of a partnership the practice of using a joint name should be discontinued as misleading to the public and the coaches so painted to distinguish the separate operators. *Re McCartney (Mo.)* 525.

IX. Penalty for illegal operation.

Jurisdiction of Commission to enforce penalty for illegal bus operation, see COMMISSIONS, 2.

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CERTIFICATES OF CONVENIENCE AND NECESSITY—continued.

26. A citation of the Commission ordering an automobile freight carrier to appear and show cause why the penalty should not be levied upon him for illegal operation was held sufficient, notwithstanding a contention that, because of its penal character it was required to allege the detailed information regarding the nature and cause of the accusation or the facts surrounding it. *Public Service Commission v. Johnson Motor Freight Lines (La.)* 175.

27. Evidence having established that a motor freight carrier was illegally operating without a certificate of convenience and necessity, the Attorney General of the state of Louisiana was requested to bring suit for the collection of a penalty of one hundred dollars imposed upon the carrier by the Commission for such violation of the law (*Act 292, Laws of Louisiana, 1926*). *Public Service Commission v. Johnson Motor Freight Lines (La.)* 175.

CHARTERS.

Burden of taxes resulting from utility continuing under its own charter independent of subsequent constitutions as not chargeable to ratepayers, see *RETURN*, 28.

Proper and legitimate expenditures made necessary in accomplishing results authorized by charter as proper basis for issue of capital securities, see *SECURITY ISSUES*, 13, 14.

Valuation of expansion construction necessitated by service beyond limits of utility charter, see *VALUATION*, 44.

CHATTEL MORTGAGE.

Indemnity for liability under conditional sales contract, see *SECURITY ISSUES*, 5.

CITATION.

Sufficiency of citation to show cause why a penalty should not be levied for illegal operation, see *CERTIFICATES OF CONVENIENCE AND NECESSITY*, 26.

CLASSES.

Necessity of valuation, even though company is willing to forego return so as to fix rates on theory that various items of expense should be allocated to respective classes, see *RETURN*, 9.

COMFORT.

Of commercial aviation, see *AVIATION*, 2.

COMMISSIONS.*I. In general, 1.**II. Jurisdiction, powers, and duties, 2-14.**a. In general, 2-9.**b. Jurisdiction and powers over legal questions, 10.**c. Power over managerial questions, 11-14.*

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COMMISSIONS—*continued.**1. In general.*

Review of orders, see **APPEAL AND REVIEW**.

Requirement that utility obtain permit from Commission before entering community not theretofore occupied by it as not unconstitutional, see **CONSTITUTIONAL LAW**, 1.

Rules as to admissibility of evidence before Commission, see **EVIDENCE**, 2.

Deduction by consumer for overcharge which Board has not authorized to order refunded, see **PAYMENT**, 3.

Rules of pleading and practice and technical rules of evidence observable by trial courts as not applying to hearings before Commission, see **PROCEDURE**, 1.

1. Commission proceedings differ from court proceedings in that the state cannot be limited in its prerogative to regulate rates by the admission of any witness. *Re Clarksburg Light & Heat Co.* (W. Va.) 290.

*II. Jurisdiction, powers, and duties.**a. In general.*

Jurisdiction over keeping of accounts, see **ACCOUNTING**, 2.

When certificate from Commission is required, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 4-8.

Jurisdiction, powers, and duties over consolidation, merger, and sale, see **CONSOLIDATION, MERGER, AND SALE**, 10.

Commission jurisdiction with respect to crossings, see **CROSSINGS**, 3.

Validity of Commission orders regarding proper installation of wiring when telephone company is engaged in interstate commerce, see **INTERSTATE COMMERCE**, 5-7.

Extent of Commission power to aid acquisition of private utility by city, see **MUNICIPAL PLANTS**, 1.

Commission duty to regulate practices, rates, and charges of municipally owned utilities, see **MUNICIPAL PLANTS**, 2.

What constitutes a public utility within the jurisdiction of the Commission, see **PUBLIC UTILITIES**.

Jurisdiction, powers, and duties with respect to rates, see **RATES**, 4-10.

Jurisdiction and powers of Commissions over reparation, see **REPARATION**, 1, 2.

Powers over return, see **RETURN**, 2.

Jurisdiction, powers, and duties of Commissions, with respect to security issues, see **SECURITY ISSUES**, 8-12.

Jurisdiction and powers over service, see **SERVICE**, 2-8.

Jurisdiction to safeguard public rights in regard to water powers, see **WATER POWERS**, 1-3.

Discussion of the policy of the legislature, recognizing the necessity for uniform regulation of public utilities, to broaden the Railroad Commission's power to meet these conditions, p. 841.

2. The Louisiana Public Service Commission has jurisdiction under an act (292 Laws of 1926) and the State Constitution (§ 4, Article VI) to order an individual accused of operating as a public motor utility P.U.R.1928B.

COMMISSIONS—*continued.*

without a certificate to appear and show cause why the penalty should not be imposed upon it. *Public Service Commission v. Johnson Motor Freight Lines (La.)* 175.

3. The Commission does not attempt to assume the powers that have been reserved by the state to the various municipalities with respect to the regulation of motor carriers. *Re Pickwick Stages System (Mo.)* 1.

4. The Commission is an administrative agency assigned to the executive department and its powers are defined by the law of its origin. *Lee's Summit v. Independence Waterworks Co. (Mo.)* 193.

5. The question of whether a Commission has been given power by the legislature to grant a public utility the right to cease operations altogether will not be decided in a proceeding where the utility has voluntarily invoked the jurisdiction of the Commission by filing a petition for abandonment. *Re Helena Electric R. Co. (Mont.)* 601.

6. A decision by the Public Service Commission of a sister state compelling a street railway company upon the discontinuance of its entire system to leave the surface of the streets in a condition similar to the remainder of the highway under a statute in that state expressly controlling such abandonment will not apply to the same situation in a jurisdiction having no such statute. *Re Helena Electric R. Co. (Mont.)* 601.

7. The presumption is that the power given to bodies for the regulation of utility companies does not extend beyond the express terms of the statutory grant. *Passaic Consol. Water Co. v. Public Utility Comrs. (N. J. Sup. Ct.)* 242.

8. A street railway system composed of eight consolidated companies, seven of which had been granted franchises directly from the legislature prior to the enactment of the constitutional provision (Article 3, § 18) regarding the control of fares and the eighth of which had been restricted to a 5-cent fare in an original charter to operate horse and mule cars, was held, as a unit, to be subject to the control of the Public Service Commission as to the regulation of fares on the theory that the electrification of the line and the magnitude of expense and innovation incident thereto was in effect a consent by all parties to a new contract in which a 5-cent fare restriction was not incorporated. *Evens v. Public Service Commission (N. Y. Ct. App.)* 247.

9. The Commission is an administrative body charged with the carrying out of the provisions of the law, and is bound by the authoritative interpretations of the state and national supreme courts. *Re Wisconsin Teleph. Co. (Wis.)* 434.

b. Jurisdiction and powers over legal questions.

10. The Commission is not authorized to pass upon the validity of a private contract with a view of rendering a judgment specifically enforcing the same. *Lee's Summit v. Independence Waterworks Co. (Mo.)* 193.

c. Power over managerial questions.

Commission power to scrutinize extravagant expenditures in rate case, see RETURN, 2.

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COMMISSIONS—continued.

11. The administrative function of railroads with regard to train service, depots, stations, spurs, etc., is peculiarly within the discretion of their managing boards and it was not the purpose of the legislature in a law (Act No. 149, Acts of 1907, amended by No. 338) providing for Commission approval of all such service arrangements to interfere with their directorate power to serve the interest of their stockholders so long as, by so doing, they do not conflict with the duty which they owe the public in such matters. *Kansas City S. R. Co. v. Railroad Commission* (Ark. Sup. Ct.) 452.

12. The substitution of the judgment of others for that of the telephone company in the determination of whether certain wires are suitable and are properly installed is an interference with the right of management, which goes beyond the reasonable limit of public control. *New England Teleph. & Teleg. Co. v. Department of Public Utilities* (Mass. Sup. Jud. Ct.) 396.

13. The Commission has no jurisdiction over wages paid by public utilities to employees except as such wages might be unreasonably high and unduly burdensome upon the rate paying public; but a telephone company was urged to increase wages to an exceptionally efficient and popular operator where public sentiment insisted upon more adequate compensation. *Re Lincoln Teleph. & Teleg. Co.* (Neb.) 533.

14. The right of utility regulation delegated to the Commission does not destroy the right of private ownership, and all the incidents thereof except in so far as may be necessary to curtail them to exercise properly the power of regulation, remain with the corporation. *Passaic Consol. Water Co. v. Public Utility Comrs.* (N. J. Sup. Ct.) 242.

COMMON BATTERY SERVICE.

Authorization of rates for common battery service, see **RATES**, 37.

Probable necessity for reconstruction of telephone system from magneto to common battery, as affecting valuation, see **VALUATION**, 15.

COMMUTATION RATES.

Commutation rates of railroad, see **RATES**, 30.

COMPARISONS.

Comparison to test reasonableness of rates, see **RATES**, 11.

COMPETITION.

See **MONOPOLY AND COMPETITION**.

COMPLAINANT.

Qualifications of complainant as immaterial if practice of utility brought before Commission is one having public interest, see **SERVICE**, 1.

COMPRESSOR STATION.

Percentage allowance for depreciation of items of natural gas property, see **DEPRECIATION**, 11-15.

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CONCLUSIVENESS OF FINDINGS.

Conclusiveness of findings on appeal, see **APPEAL AND REVIEW**, 6.

CONDITIONAL SALES.

Indemnity for liability under conditional sales contract, see **SECURITY ISSUES**, 5.

CONNECTIONS.

Accessories and service connections, see **SERVICE**, 34-37.

CONSERVATION.

Schedule of step-up rates prescribed in order to conserve natural gas supply as not satisfactory where it is not possible for company to conserve gas underlying property, see **RATES**, 29.

CONSOLIDATION, MERGER, AND SALE.*I. In general, 1-9.**II. Jurisdiction, powers, and duties of Commissions, 10.**III. Metropolitan transit reorganization, 11-14.**I. In general.*

Grant of certificate for operation of gas utility although a private company in taking over a system previously constructed by a city has functioned without authority, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 11.

Seizure and sale of motor bus equipment by sheriff and resumption of service by the purchasers under authority of Commission as causing break in continuity of service originating prior to regulation, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 22.

Adjustments in fares or charges for transfers as not considered in application for approval of merger of street railway systems, see **RATES**, 33.

Profit on valuation not in excess of reproduction price as not unfair burden upon public, see **RETURN**, 5.

Increased operating expenses following consolidation, see **RETURN**, 19.

Upset price of street railway property fixed by court in receiver's sale as of little importance in determining amount of securities to be issued by new company, see **SECURITY ISSUES**, 2.

Provisions relating to mortgage bonds and other securities of company purchasing street railway at receiver's sale, see **SECURITY ISSUES**, 3.

Fact that utility devotes property to public use by operating street railway system which it has purchased after expiration of franchise as not constituting irrevocable or absolute dedication of property to use of public, see **SERVICE**, 24.

Ascertainment of value for consolidation or sale, see **VALUATION**, 11-13.

Purchase of competitor's right as not a part of rate base, see **VALUATION**, 39.

Annotation on consolidation, merger, and sale, p. 827.

Annotation on desirability of consolidation and merger, p. 828.

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CONSOLIDATION, MERGER, AND SALE—*continued*.

Annotation on objections to consolidation or merger, p. 829.

Annotation on purchase price and terms of sale, p. 830.

Annotation on conditions, p. 832.

Discussion of the advantages accruing from merger of gas and electric utilities because of their dependence upon mutual relationship, p. 268.

1. The advantage or disadvantage to the patrons of a community served by any merging company should be considered where it is proposed to merge several utility companies into a single consolidation. Re Connecticut Light & P. Co. (Conn.) 263.

2. There should be economic advantages in a merger of electric companies, by the reduction of overhead and general operating expenses and the guarantee of uninterrupted and improved service by the interchange of current where the size of the corporate property and the industry merged is not such as to become unwieldy under unified management, or to lose a proper degree of contact with its patrons. Re Connecticut Light & P. Co. (Conn.) 263.

3. Evidence as to the ownership of stock in a telephone utility is pertinent and material to the consideration of a petition for authority to purchase such stock by two other telephone companies. Re Northwestern Indiana Teleph. Co. (Ind.) 717.

4. Property of a telephone utility proposed to be divided between two neighboring companies must be divided along lines indicating that public interest has been considered rather than arbitrary separations dictated by the interest of stockholders if the transaction is to merit the approval of the Commission. Re Northwestern Indiana Teleph. Co. (Ind.) 717.

5. A petition by two neighboring telephone exchanges to divide the property of another utility in the territory by the acquisition of capital stocks and assets was denied where the evidence showed that laws respecting the purchase of stock in one utility by another and regarding the qualification of directors had been evaded and violated, respectively, and that the proposed division was without regard to public convenience and without consideration of the public sentiment of the subscribers affected. Re Northwestern Indiana Teleph. Co. (Ind.) 717.

6. It is not necessary in a proceeding for Commission approval of a consolidation of electric utilities for the Commission to determine in any way what portion of the property, if any, may be capitalized or will be recognized as a basis for rate-making purposes where the petition presents neither the issue of securities nor the fixing of rates. Re Bethel Light Co. (Me.) 512.

7. A consolidation of electric utilities was approved upon a showing that proper corporate action had been taken by the several petitioners who authorized the sale of the property, rights and franchises involved. Re Bethel Light Co. (Me.) 512.

8. A petition for the consolidation of electric utilities was approved upon condition that the purchasing utility prior to the sale take proper corporate action binding itself to assume the duties to the public previously incumbent upon the utilities merged. Re Bethel Light Co. (Me.) 512.

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CONSOLIDATION, MERGER, AND SALE—*continued.*

9. The merger of two street railway companies was approved where it was apparent that the uniting of the two systems with the resulting transfer privileges extending throughout the single fare area was for the great convenience of a large number of people. *Re Milwaukee Electric R. & Light Co. (Wis.)* 345.

II. Jurisdiction, powers, and duties of Commissions.

Extent of Commission power to aid acquisition of private utility by city, see *MUNICIPAL PLANTS*, 1.

Right of Commission to know amount for which property has been sold, see *VALUATION*, 1.

Annotation on jurisdiction, powers, and duties of Commissions with respect to consolidation, merger, and sale, p. 828.

10. A Commission has no jurisdiction, under a law (Art. III, § 6, Public Service Commission Law) requiring its approval of the sale of the controlling interest in stock in one utility to another, to prevent the sale of such stock to an individual in the interest of a nonresident holding company also owning the stock of another resident utility which was previously refused permission to buy any of the first utility stock because of an intended acquisition of the same by the borough in which it operated. *Brookville v. Solar Electric Co. (Pa.)* 621.

III. Metropolitan transit reorganization.

11. A plan of a reorganization committee, purchasers at a judicial sale of street railway properties, whereby a real estate corporation was to be formed to take over the car-barn property, yielding a substantial net annual income in rentals, and whereby the traction system, having a net annual deficit somewhat in excess of such income, was to be conveyed to a newly formed operating company, was held economically unsound and foredoomed to failure in view of the fact that the operating corporation, bereft of its barn, the only valuable asset of the property, would be faced with the problem of paying rent for the use of its portion of space without funds to meet operating expenses and in view of the further fact that the separation of properties was likely to result in the ultimate discontinuance of service to the inconvenience of 17,000,000 patrons. *Re Second Avenue R. Co. (N. Y. T. C.)* 820.

12. A reorganization plan by the purchasers at a judicial sale of street railway properties, whereby the real assets and operating rights are to be conveyed separately to two newly formed corporations, is contrary to a law (§ 151, Railroad Law), mandatory in its character, providing that such purchasers may convey "property and franchises" to a "railroad corporation," in view of the apparent intent of the statute that such assets be not separated. *Re Second Avenue R. Co. (N. Y. T. Co.)* 820.

13. A reorganization plan by the purchasers at a judicial sale of street railway properties, whereby the real assets and operating rights are to be conveyed to two new companies respectively is contrary to a law (§ 96, Stock Corporation Law) providing that a new corporation buying P.U.R.1928B.

CONSOLIDATION, MERGER, AND SALE—continued.

from such purchasers is to be vested with "all the rights, privileges and franchises" of the defunct company and "shall be subject to all the duties imposed by law on that corporation." *Re Second Avenue R. Co.* (N. Y. T. C.) 820.

14. There would be no justification for permitting the consummation of a transit reorganization plan that is foredoomed to failure, through the withdrawal of the only part of the property that has any revenue value, even if the law permitted this to be done. *Re Second Avenue R. Co.* (N. Y. T. Co.) 820.

CONSTITUTIONAL LAW.***I. In general, 1.******II. Delegation of powers, 2, 3.******III. Due process, 4-8.******IV. Impairment of contracts, 9.******V. Police power, 10-16.******I. In general.***

1. A provision of an act that a utility which was doing business in the state when the act was passed must obtain a permit from the Commission before entering a community not theretofore occupied by it, is not a violation of the constitutional rights of the utility. *Kansas Gas & E. Co. v. Public Service Commission* (Kan. Sup. Ct.) 492.

II. Delegation of powers.

2. A statutory provision (Chap. 235, Laws of 1927) requiring a public utility to obtain from the Commission a certificate of convenience and necessity before the construction or operation of any utility plant or system is not an unlawful invasion of the rights of a municipality under a constitutional provision (§ 139, State Constitution) prohibiting legislation allowing the construction or operation of various utilities within a city, town, or incorporated village without the consent of local authorities. *Minor v. Erickson* (N. D.) 832.

3. The grant of power by the legislature to one subordinate governing body may lawfully be wholly withdrawn by the legislature and reposed by it in some other subordinate body. *Minor v. Erickson* (N. D.) 832.

III. Due process.

Statement that a private carrier cannot be converted into a common carrier by mere legislative demand consistently within the due process clause of the 14th Amendment of the Federal Constitution, p. 261.

4. State regulation through a Public Service Commission, requiring a carrier to maintain commutation service between points within the state, and fixing rates therefor which are less than the intrastate rate lawfully established for one-way intrastate travel in general, does not deprive the carrier of due process of law when the service so regulated was established by the carrier voluntarily and the rates fixed by the state are reasonable. *Georgia Pub. Service Commission v. Atlanta & West Point R. Co.* (Ga. Sup. Ct.) 136.
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CONSTITUTIONAL LAW—*continued.*

5. But where the Railroad Commission of this state established commutation rates between points on the line of railroad of a carrier in this state, and not between the points where commutation rates were already voluntarily established by the carrier, and the carrier was required to "establish commutation passenger fares," between certain points "at a rate not higher per mile per passenger than commutation rates now in effect between" the points originally named by the carrier, and where, on the trial of a cause seeking to enjoin the enforcement of the order of the Commission on the ground that such rates deprived the carrier of due process of law and the equal protection of the laws, the undisputed evidence for the plaintiff showed that the rates were below the cost of transportation and were unremunerative, the trial court did not err in granting a permanent injunction against the enforcement of the order of the Commission. Such rates deprived the carrier of due process of law and the equal protection of the laws. *Georgia Pub. Service Commission v. Atlanta & West Point R. Co.* (Ga. Sup. Ct.) 136.

6. An order of the Commission requiring that a telephone company become owner of privately installed service equipment which it may later be compelled to reject for incompatibility with service requirements is an unreasonable interference with its property rights. *New England Teleph. & Teleg. Co. v. Department of Public Utilities* (Mass. Sup. Jud. Ct.) 396.

7. To compel a street railway company to operate a system at a loss, or to give up its salvage value, would be to take its property without the just compensation which is a part of due process of law. *Re Helena Electric R. Co.* (Mont.) 601.

8. The contention of a lumber operator whose logs had been transported by a public carrier for less than the authorized tariff, that the state rate regulation deprived it of its property rights in violation of the 14th Amendment of the Constitution, had no foundation where the charges in question were conceded not to be excessive. *Washington ex rel. Stimson Lumber Co. v. Kuykendall* (U. S. Sup. Ct.) 258.

IV. Impairment of contracts.

9. An ordinance granting a franchise to a public utility of the same rights as were granted to another utility by a previous ordinance is valid where the rights granted under the first ordinance were not exclusive, since no obligation of contract is impaired. *El Dorado v. Coats* (Ark. Sup. Ct.) 351.

V. Police power.

10. The right of a city to contract away its right as to rates to be charged by a public service corporation is the only limitation that can be imposed upon the police power by contract. *New Haven Water Co. v. New Haven* (Conn. Sup. Ct. Err.) 475.

11. The state cannot authorize a municipality to establish, by contract, rates to be charged by a utility for a perpetual or unreasonably long term since it would be a surrender of police power over rates and neither the "due process" nor the "contract" clause of the Constitution P.U.R.1928B.

CONSTITUTIONAL LAW—continued.

can have the effect of overriding that power. *New Haven Water Co. v. New Haven* (Conn. Sup. Ct. Err.) 475.

12. A rate contract between a municipality and a utility for an unreasonable term is not void *in toto*, being subject only to modification by lawful authority which is implied in all such contracts if they contravene the police power with respect to duration. *New Haven Water Co. v. New Haven* (Conn. Sup. Ct. Err.) 475.

13. A rate contract between a city and a utility although for an indefinite term, does not, as to the city, contract away police power where it provides that rates must be fair and reasonable and gives the city a remedy by way of arbitration if the rates are unreasonable, particularly specifying the items which shall be taken into consideration by the arbitrators in fixing such rates. *New Haven Water Co. v. New Haven* (Conn. Sup. Ct. Err.) 475.

14. A rate contract for an indefinite term giving to the city the right of arbitration every five years, if unreasonable rates develop, but allowing no such remedy to the utility is as to the latter a rate contract of unreasonable duration and beyond the power of the General Assembly to grant either of itself or by delegation of authority by a municipality, being a surrender of the state police power over the regulation of rates. *New Haven Water Co. v. New Haven* (Conn. Sup. Ct. Err.) 475.

15. The Constitution supposes the pre-existence of the police power in the state, and its construction must be with reference to that fact. *Chicago & N. W. R. Co. v. Illinois Commerce Commission* (Ill. Sup. Ct.) 153.

16. An order of the Commission requiring a railroad at its own expense to relocate its crossing on a highway and to change from an overhead crossing to a subway is a valid exercise of the police power of the state in the interest of public service and does not shift to the carrier the burden of public improvement so as to infringe the company's rights under the Constitution of the United States (14th Amendment) or that of the state of Illinois (§ 13, Article 2). *Chicago & N. W. R. Co. v. Illinois Commerce Commission* (Ill. Sup. Ct.) 153.

CONSTRUCTION WORK.

See also **EQUIPMENT AND CONSTRUCTION.**

Negotiations for construction of utility and procurement of franchise to operate prior to effective date of regulatory act as not actual construction, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 20.

CONSUMERS AND PATRONS.

Consumers' advances as affecting depreciation allowance of street railway, see **DEPRECIATION**, 6.

Consumers' credit for excessive accumulation of depreciation reserve, see **DEPRECIATION**, 17.

Authorization of increase in telephone rates where reconstruction of system from grounded to metallic lines is necessary and consented to by subscribers, see **RATES**, 14.

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CONSUMERS AND PATRONS—continued.

- Allocation of customer cost in determining gas rate structure, see **RATES**, 26, 27.
- Necessity of valuation, even though company is willing to forego return so as to fix rates on theory that various items of expense should be allocated to respective classes of customers in view of expenses varying with size and value of property, see **RETURN**, 9.
- Right of gas utility to discontinue service where consumer refuses or neglects to maintain condition at residence admitting of regular meter reading, see **SERVICE**, 33.
- Ownership of meters, see **SERVICE**, 34.
- Duty to notify consumer of requirements of service, see **SERVICE**, 43.
- Valuation of meters owned by consumers, see **VALUATION**, 41.

CONTRACTS.

- See also **FRANCHISES**.
- Impairment of contracts generally, see **CONSTITUTIONAL LAW**, 9.
- Antiduplication contracts generally, see **MONOPOLY AND COMPETITION**, 2, 3.
- Commission as not authorized to pass upon validity of private contract, see **COMMISSIONS**, 10.
- Number of parties with which alleged private hauling contracts are made as determining in a measure the status of the carrier, see **PUBLIC UTILITIES**, 5.
- Rates fixed by contract authorized by legislature for unlimited or unreasonable duration as in violation of police power, see **RATES**, 1.
- Commission jurisdiction over rates fixed by contract, see **RATES**, 5, 6, 9.
- Determination of fair and reasonable rates according to statutory provisions or according to provisions of contract, see **RATES**, 12.
- Indemnity for liability under conditional sales contract, see **SECURITY ISSUES**, 5.
- Jurisdiction of Commission to consider recapture provision of city traction contract, see **SECURITY ISSUES**, 9.
- Effect of collateral contracts on duty to serve, see **SERVICE**, 9.
- Utility voluntarily signing agreement to furnish water to municipality and entering field as assuming burden placed upon it by law to give adequate service, see **SERVICE**, 12.
- Agreement between residents of elevated section outside of city limits, but within metropolitan area, and water utility consenting to higher rates for service in consideration of additional equipment, see **SERVICE**, 17.
- Evidence and facts applicable, and not terms of contract as governing Commission decision as to complaint against insufficient water supply, see **SERVICE**, 22.
- Acceptance of service application as creating implied contract to serve, see **SERVICE**, 42.
- Utility as not entitled to insist upon compliance with contract which has been waived, see **SERVICE**, 44.

CONTRACTS—continued.

1. The state or a city council in the exercise of its sovereignty may contract like an individual, and be bound accordingly. *El Dorado v. Coats* (Ark. Sup. Ct.) 351.

2. An ambiguity in a rate contract providing for payment by a city of certain taxes levied upon a utility must be construed as including those kinds of taxes which the parties to the contract intended them to include. *New Haven Water Co. v. New Haven* (Conn. Sup. Ct. Err.) 475.

3. An ambiguity in a rate contract clause providing for payment by a city of certain taxes levied upon a utility must be resolved most strongly in favor of public interest where public interest is affected. *New Haven Water Co. v. New Haven* (Conn. Sup. Ct. Err.), 475.

4. An ambiguity in a rate contract clause providing for payment by a city of certain taxes levied upon a utility cannot be construed against the utility in whose favor the phrase was inserted. *New Haven Water Co. v. New Haven* (Conn. Sup. Ct. Err.) 475.

5. An ambiguity in a rate contract clause providing for payment by a city of certain taxes levied upon a utility cannot be construed by the rule *ejusdem generis*, or what was intended, where the Federal taxes sought to be recovered were not in existence at the time of execution, and hence could not have been within the contemplation of the contracting parties. *New Haven Water Co. v. New Haven* (Conn. Sup. Ct. Err.) 475.

6. The acts of parties to a rate contract having an ambiguous clause providing for the payment annually or oftener by the city of certain taxes levied upon a utility is the most persuasive evidence of the true construction to be given the phrase and what the parties intended, and the payment by the utility of Federal taxes for seventeen years without protest raises a presumption that it never intended such taxes to be included. *New Haven Water Co. v. New Haven* (Conn. Sup. Ct. Err.) 475.

CONTRIBUTIONS.

Donations as not chargeable as an operating expense, see **RETURN**, 33.

CONVENIENCE.

See also **CERTIFICATES OF CONVENIENCE AND NECESSITY**.

Of commercial aviation, see **AVIATION**, 2.

CORRESPONDENCE.

Effect of solicitous correspondence on status of carrier as public or private, see **PUBLIC UTILITIES**, 7.

COSTS AND EXPENSES.

Cost and expenses at crossings, see **CROSSINGS**.

Necessity of valuation, even though company is willing to forego return so as to fix rates on theory that various items of expense should be allocated to respective classes of customers in view of expenses varying with size and value of property, see **RETURN**, 9.

Operating expenses and other deductions from gross revenues, see **RETURN**, 19-34.

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COSTS AND EXPENSES—continued.

- Expense of investigating service defects, see **SERVICE**, 36.
- Treatment of overheads in valuation, see **VALUATION**, 24-35.
- Valuation of mains and pipes, see **VALUATION**, 45.

COURTS.

- See also **APPEAL AND REVIEW**.
- Commission as bound by decisions of superior tribunals, see **COMMISSIONS**, 9.
- Powers over rates, see **RATES**, 3.

CROSS EXAMINATION.

- Cross examination of witness upon exhibit not in evidence as correctly denied to railroad attacking Commission order in lower court, see **EVIDENCE**, 3.
- Questions concerning facts within the common knowledge of man as correctly denied on cross examination of expert witnesses, see **EVIDENCE**, 4.

CROSSINGS.

- Commission order requiring railroad at its own expense to relocate crossing and to separate grade as not an exercise of police power, see **CONSTITUTIONAL LAW**, 16.
 - Wrongful admission of oral testimony as to construction policy of highway department with reference to grades as not prejudicial error, see **EVIDENCE**, 1.
 - Exercise of local police powers with respect to interstate railroads, see **INTERSTATE COMMERCE**, 3, 4.
 - Proposed capital investment made necessary by order directing construction of viaduct over crossing and apportioning part of expense to street railway as not a capital charge at the present time, see **VALUATION**, 40.
 - Annotation on jurisdiction, powers, and duties of Commissions, p. 851.
 - Annotation on Commission jurisdiction over elimination of grade crossings, p. 851.
 - Annotation on jurisdiction of Commissions over establishment of grade crossings, p. 851.
 - Annotation on jurisdiction of Commissions over protection of grade crossings, p. 851.
 - Annotation on powers of municipalities over crossings, p. 851.
 - Annotation on establishing grade crossings, p. 851.
 - Annotation on elimination of grade crossings, p. 853.
 - Annotation on degree of danger as affecting elimination of crossings, p. 854.
 - Annotation on apportionment of expense of crossing elimination, p. 855.
 - Annotation on protection at crossings, p. 855.
 - Annotation on necessity and cost of crossing protection, p. 855.
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CROSSINGS—*continued.*

Annotation on particular type of crossing protection, p. 856.

1. A Commission order for a separation of grades that would involve a construction of subway instead of an overpass for the highway was held not unreasonable or arbitrary in view of the fact that the latter type of construction would necessitate road building in excess of the 6 per cent maximum grade rule followed by the highway department as well as hazardous curves on grades at the approaches. *Chicago & N. W. R. Co. v. Illinois Commerce Commission* (Ill. Sup. Ct.) 153.

2. A railroad in accepting its franchise agrees to submit to all burdens, conditions, and regulations imposed by the state with reference to its tracks and their intersections with highways necessary for the safety of the traveling public. *Chicago & N. W. R. Co. v. Illinois Commerce Commission* (Ill. Sup. Ct.) 153.

3. A separation of grades shall be ordered by the Commission under the Public Utilities Act (§ 58, Smith-Hurd Rev. St. 1925, Chap. 111½, § 62), only when necessary to preserve or promote public safety. *Chicago & N. W. R. Co. v. Illinois Commerce Commission* (Ill. Sup. Ct.) 153.

4. A railroad may not be made to contribute to the expense of a viaduct over its tracks in a valley, where the necessity therefor is wholly independent of the presence of the track and determined by the lay of the land and the needs of the populace, and where there is no showing that the ravine could be filled in at grade in a feasible manner. *St. Paul v. Great Northern R. Co.* (Minn.) 788.

5. A railroad is not relieved of its proportionate obligation in bearing the expense of viaduct construction made necessary in whole or in part by the presence of its track where the city in the solution of its traffic problem has decided upon a different and larger structure, and contribution from the carrier may be required to the extent of its original obligation. *St. Paul v. Great Northern R. Co.* (Minn.) 788.

6. A street railway whose tracks have to be rerouted over a new bridge crossing a railroad is not entitled to the full salvage value of an old structure built by the company but dedicated to the public, since a rerouting of its system which would have rendered unnecessary the use of the old bridge, manifestly would not have given it the right to remove the bridge. *Pottsville v. Reading Co.* (Pa.) 846.

7. The difference between the salvage value and the cost of removing an old bridge was apportioned on the same basis as the expense of a new bridge. *Pottsville v. Reading Co.* (Pa.) 846.

8. An added expense of extra trainmen and watchmen's wages for temporary rerouting of street cars and a transfer during bridge construction was considered a part of the total expense of the bridge and apportioned to the different parties on the same ratio where such expense was occasioned by delay in the completion of the bridge owing to the lack of co-ordination between the wrecking crew and the erecting crew of independent contractors. *Pottsville v. Reading Co.* (Pa.) 846.

9. A rule of the Commission, governing the operation of motor busses and prohibiting the stopping of a bus for the exchange of passengers near any designated stopping place of an electric railroad, was not *applicable*. 1928B.

CROSSINGS—continued.

plied to the licensed operations of a motor utility between cities or wherever they intersected the tracks of an interurban railway whose service had been proven inadequate, the regulation of such matters being left to city authorities. Re Jewett (Vt.) 225.

CUSTOMER COSTS.

Allocation of customer costs in determining gas rate structure, see RATES, 26, 27.

DAMAGES.

Damages because of power line interference with telegraph transmission, see ELECTRICITY, 2, 3.

Denial of receipt of letter from city plant officials as admissible in evidence in suit for damages for failure to serve, see EVIDENCE, 6.

Evidence by city plant as to its procedure upon application for service as proper where it is being sued for damages resulting from alleged failure to serve, see EVIDENCE, 7.

Refusal to enjoin operation of motor bus utility unauthorized by Commission or other governmental authority in suit filed by competing railroad unless irreparable loss is shown, see INJUNCTION, 2, 3.

Damages arising from improper discontinuance of service, see SERVICE, 21.

DECREASED USE.

Rates of fare as not to be established to produce theoretical returns when their practical application is likely to restrict traffic so as to defeat purpose, see RATES, 15.

DEDICATION.

Fact that utility devotes property to public use by operating street railway system which it has purchased after expiration of franchise as not constituting irrevocable or absolute dedication of property to use of public, see SERVICE, 24.

DELEGATION OF POWERS.

Delegation of powers, see CONSTITUTIONAL LAW, 2, 3.

DEMAND CHARGE.

Approval of room rate demand charge, see RATES, 25.

DEPLETION.

Depreciation in natural gas property resulting from exhaustion of natural gas, see VALUATION, 17.

DEPOSIT.

Reserve for uncollectible accounts of natural gas company as not chargeable to operating expense when each consumer is required to make deposit, see RETURN, 31.

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DEPOSIT—continued.

Provisions relating to mortgage bonds and other securities of company purchasing street railway at receiver's sale, see **SECURITY ISSUES**, 3.

Rules and regulations of water utility, see **SERVICE**, 46-52.

DEPOTS.

Extent of Commission jurisdiction over managerial questions of service, see **COMMISSIONS**, 11.

DEPRECIATION.*I. Basis for allowance, 1, 2.**II. Computation of amount, 3-7.**III. Determination of accrued depreciation, 8-10.**IV. Allowances for particular utilities, 11-19.**a. Natural gas property, 11-15.**b. Telephone property, 16, 17.**c. Water utilities, 18, 19.**I. Basis for allowance.*

1. It is the book cost or original investment that must be amortized through the annual allowance for depreciation and depletion, and not the value of the property. Re *Cumberland & A. Gas Co. (W. Va.)* 20.

2. Depreciation should be applied to the theoretical cost of utility property new including those items for overheads which have been included in the estimates of such cost. Re *Clarksburg Light & Heat Co. (W. Va.)* 290.

II. Computation of amount.

3. An allowance for annual depreciation claimed by a water utility was raised by the Commission in view of the fact that the item had been based upon an estimate of accrued depreciation which had been disapproved and increased by the Commission, and the annual allowance was increased in proportion. *Knoxville v. South Pittsburgh Water Co. (Pa.)* 204.

4. An annual charge for amortization of physical property of a natural gas company based on the estimated cost of reproduction new less observed deterioration less the value of salvable property, with no allowance for amortization on distribution system property upon the assumption that this property might be adapted to the service of mixed or manufactured gas after the exhaustion of natural gas, was disapproved, partly because of the adequate provision made in the past for amortization. Re *Clarksburg Light & Heat Co. (W. Va.)* 290.

5. Operating charges should be sufficient to take care of the depreciation and provide for the retirement of the additions to capital that are necessarily made from year to year, including gas well construction costs in the case of a natural gas utility. Re *Clarksburg Light & Heat Co. (W. Va.)* 290.

6. A retirement expense of 2.5 per cent on the Commission's valuation P.U.R.1928B.

DEPRECIATION—continued.

was believed to be an adequate charge against operations to give due recognition to consumers' advances where the valuation represented an undepreciated value, and, therefore, included, to the extent of the retirement reserve, an investment made out of the advances by the consumers. *Re Duluth Street R. Co. (Wis.) 228.*

7. Annual depreciation should be determined by the straight-line method where the rate base has been obtained through the depreciated value of the property. *Re Wisconsin Teleph. Co. (Wis.) 434.*

III. Determination of accrued depreciation.

Application of depreciation to theoretical cost of the utility property including overheads, see *supra*, 2.

8. Visible deterioration is not equivalent to the accrued depreciation of a public utility and the practice of computing depreciation by including the expense of repairs obviously needed was disapproved as insufficient. *Knoxville v. South Pittsburgh Water Co. (Pa.) 204.*

9. The making of only eight examinations of 12-inch natural gas mains, and four examinations of 10-inch mains, where there are approximately ninety miles of the line, with a failure to examine a 12-inch line about fifty-five miles long, cannot be approved as a method of determining accrued depreciation where the line extends through sections underlain with coal and the soil conditions are constantly changing. *Re Cumberland & A. Gas Co. (W. Va.) 20.*

10. The cost of salvaging equipment, the cost of complying with a law requiring abandoned wells to be securely plugged, and the loss of the cost of labor and material upon the abandonment of property must be considered in ascertaining the accrued depreciation of gas well equipment. *Re Clarksburg Light & Heat Co. (W. Va.) 290.*

IV. Allowances for particular utilities.**a. Natural gas property.**

Disapproval of allowance for amortization of physical property of natural gas company partly because of adequate past provision, see *supra*, 4.

Discussion of annual depreciation, depletion, and amortization in the case of a natural gas utility, p. 79.

11. Structures of a natural gas company were depreciated approximately 2 per cent per year. *Re Cumberland & A. Gas Co. (W. Va.) 20.*

12. A lower percentage of depreciation may be applied to field rights-of-way, field line construction, and field line equipment of a natural gas company than is applied to wells, since a part of the field lines and rights-of-way may be used to gather gas after the company's wells are exhausted. *Re Cumberland & A. Gas Co. (W. Va.) 20.*

13. Field measuring station equipment of a natural gas utility was depreciated at approximately 2 per cent per year. *Re Cumberland & A. Gas Co. (W. Va.) 20.*

14. Compressor station structures of a natural gas company having an average age in excess of fourteen years, and compressor station equipment *P.U.R.192sB.*

DEPRECIATION—continued.

were depreciated about 2 per cent per year. *Re* Cumberland & A. Gas Co. (W. Va.) 20.

15. Transmission line equipment of a natural gas company was depreciated approximately 1 per cent a year where there was a certain amount of deterioration in the iron and steel pipe not disclosed by a superficial examination. *Re* Cumberland & A. Gas Co. (W. Va.) 20.

b. Telephone property.

16. An annual depreciation allowance of $4\frac{1}{2}$ per cent of the original cost of the depreciable property of a telephone company was considered reasonable to cover accruing depreciation. *Re* Clinton County Teleph. Co. (Mo.) 796.

17. Subscribers of a telephone utility were held to be entitled to a credit of 5 per cent per annum on an excess accumulation of a depreciation reserve. *Re* Wisconsin Teleph. Co. (Wis.) 434.

c. Water utilities.

18. The annual depreciation of a water utility was computed on the basis of .41 of one per cent of the depreciable property in a depreciated reproduction cost new estimate. *Shamokin v. Roaring Creek Water Co.* (Pa.) 385.

19. An annual allowance of \$6,300 for depreciation was permitted on water utility properties valued at \$600,000. *Clearfield v. Clearfield Water Co.* (Pa.) 639.

DETERIORATION.

Visible deterioration as not equivalent to accrued depreciation, see **DEPRECIATION**, 8.

DEVELOPMENT COSTS.

Factors considered in allowing for going value, see **VALUATION**, 65-74.

DIRECTORS.

Evasion of statutory provisions relating to stock purchases and qualification of directors as affecting consolidation of telephone exchanges, see **CONSOLIDATION, MERGER, AND SALE**, 5.

Violation of law with regard to directors of domestic telephone company, see **INTERCORPORATE RELATIONS**, 2.

DISCONTINUANCE OF SERVICE.

Discontinuance of service to enforce payment, see **PAYMENT**.

DISCOUNTS.

Discount for prompt payment, see **PAYMENT**, 6.

Capitalization of bond discount, see **SECURITY ISSUES**, 7.

Sale of bonds at discount, see **SECURITY ISSUES**, 15-18.

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DISCRIMINATION.

Burden of proof to support contention that rates are misleading, inequitable, and discriminatory as not sustained, see **RATES**, 18.

Absence of presumption that statutory requirement that municipalities guarantee dividends to water utility was meant as consideration for free fire service, see **RETURN**, 1.

Duty of municipal water utility to supply water impartially, see **SERVICE**, 10.

Summer resort company engaged in serving public as rendering public service and having duty to serve all patrons alike even though it is only a semi-public utility corporation, see **SERVICE**, 11.

1. Discrimination to be unlawful must be unjust, and to be unjust it must be shown that a carrier's rates at the preferred points are not justified and that the circumstances and conditions are the same as at the point which is alleged to be damaged. *Sperry Flour Co. v. Island Transp. Co.* (Cal.) 563.

2. The mere showing that rates from one point in a territory are higher than rates from other points in that territory, whether maintained by the same or different carriers, does not establish the fact of undue prejudice or preference. *Sperry Flour Co. v. Island Transp. Co.* (Cal.) 563.

3. The prejudice to a small group of consumers necessarily resulting from a rate schedule effecting the consolidation of two or more classes of service should not be allowed to stand in the way of an otherwise desirable form of rate schedule where it is not unreasonable and beneficial to the large majority. *Sullivan v. Rockland Electric Co.* (N. J.) 201.

4. A statutory enactment that rates should not be unreasonable or unjustly discriminatory was held to rebut any presumption of any prior legislative authority for free fire service to municipalities. *Pottsville v. Pottsville Water Co.* (Pa.) 613.

5. The practice of granting lower rates for public utility service to municipal and other public corporations is discriminatory. *Re Clarksburg Light & Heat Co.* (W. Va.) 290.

DISPUTED BILLS.

Discontinuance of service to enforce payment of a disputed bill, see **PAYMENT**, 1.

DITCHES.

Treatment of cost of trenching and backfilling in natural gas property valuation, see **VALUATION**, 46.

DIVIDENDS.

Economy of operation where coupled with efficiency of operation as not to be penalized but to be recognized in giving consideration to proper annual dividends, see **RETURN**, 6.

DONATIONS.

Donations as not chargeable as an operating expense, see **RETURN**, 33.
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DRILLING.

Expenditures for labor and other expenses in drilling new gas wells as chargeable to gas well construction instead of to operating expenses, see RETURN, 34.

Charges for cost of labor, hauling freight, and similar items incurred in drilling of natural gas wells as not included in rate base when these items have been charged to operating expense, see VALUATION, 38.

DUE PROCESS.

See CONSTITUTIONAL LAW, 4-8.

DUTIES.

Of Commissions generally, see COMMISSIONS, 2-14.

Of Commissions over consolidation, merger, and sale, see CONSOLIDATION, MERGER, AND SALE, 10.

Of Commissions with respect to rates, see RATES, 4-10.

Of Commissions with respect to security issues, see SECURITY ISSUES, 8-12.

EARNINGS.

Capitalization as bearing relation to earnings as well as cost or value of property, see SECURITY ISSUES, 1.

EASEMENTS.

Valuation of, see VALUATION, 58-64.

ECONOMY.

Economy of operation where coupled with efficiency of operation as not to be penalized but to be recognized in giving consideration to proper annual dividends, see RETURN, 6.

Authorization of bonds and discounts to provide for electrification of railway where difference was to be amortized and could be absorbed by savings, see SECURITY ISSUES, 15.

Consideration of modern construction economies in determining reproduction cost, see VALUATION, 5.

EFFICIENCY.

Economy of operation where coupled with efficiency of operation as not to be penalized but to be recognized in giving consideration to proper annual dividends, see RETURN, 6.

ELECTRICITY.

Requirement that corporations apply for certificates relating to development of hydroelectric energy, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 1.

Grant of certificate because of operation in good faith prior to regulation, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 17, 20, 21.

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ELECTRICITY—*continued.*

- Consolidation of companies, see CONSOLIDATION, MERGER, AND SALE.
 - Discrimination in electric rates, see DISCRIMINATION, 3.
 - Condemnation of property for "maintenance" of utility service, see EMINENT DOMAIN, 1.
 - Materiality of evidence as to duty to serve, see EVIDENCE, 10, 11.
 - Competition between electric companies, see MONOPOLY AND COMPETITION, 1-3, 5, 6.
 - Extent of Commission power to aid acquisition of private utility by city, see MUNICIPAL PLANTS, 1.
 - Commission duty to regulate practices, rates, and charges of municipally owned utilities, see MUNICIPAL PLANTS, 2.
 - Commission duty to establish just and reasonable rates, see RATES, 10.
 - Reduction of electric rates because of improvident service contract for power from affiliated company, see RATES, 13.
 - Burden of proof to support contention that rates are misleading, inequitable, and discriminatory as not sustained, see RATES, 18.
 - Approval of room rate demand charge, see RATES, 25.
 - Electric rates, see RATES, 25.
 - Unreasonably low rate of city plant causing burden on taxpayers, see RATES, 28.
 - Treatment of application of power utility to issue additional securities because of alleged increase to value of land and water rights, see SECURITY ISSUES, 6.
 - Summer resort company engaged in serving public as rendering public service and having duty to serve all patrons alike even though it is only a semi-public utility corporation, see SERVICE, 11.
 - Utility as not to accept only parts of franchise as convey rights without assuming obligations, see SERVICE, 16.
 - Commission jurisdiction over hydroelectric development, see WATER POWERS, 1-3.
 - Licenses for diversion of state water power as not granted wholly for benefit for licensees but pursuant to policy of state favoring generation of low priced hydroelectric power, see WATER POWERS, 4.
1. Interference with the transmission of telegraph messages caused by induction of electrical forces from a nearby high voltage power line is not a nuisance within the Civil Code (§ 3479). *Postal Teleg.-Cable Co. v. Pacific Gas & E. Co.* (Cal. Sup. Ct.) 361.
 2. The principle which subjects to a high liability the owner who uses his property for unnatural purposes will not operate to give rise to a claim by a telegraph company for damages caused by interference to the transmission of messages caused by the induction of electrical forces from high voltage power lines in view of the unnatural use of property indulged in by the telegraph company itself. *Postal Teleg.-Cable Co. v. Pacific Gas & E. Co.* (Cal. Sup. Ct.) 361.
 3. An allegation by a telegraph company that power lines were negligently constructed and maintained at different localities in the state was too general and hence demurrable in an action for damages resulting from interference with transmission of messages caused by the induction of cur-

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ELECTRICITY—continued.

rent from such high voltage line. *Postal Teleg.-Cable Co. v. Pacific Gas & E. Co.* (Cal. Sup. Ct.) 361.

ELECTRIC RAILWAYS.

See also INTERURBAN RAILWAYS; STREET RAILWAYS.

Question whether a Commission has been given power by legislature to grant utility the right to cease operations altogether as not decided in proceeding where the utility has voluntarily invoked jurisdiction of Commission by filing petition for abandonment, see COMMISSIONS, 5.

Metropolitan transit reorganization, see CONSOLIDATION, MERGER, AND SALE, 11-14.

ELECTRIFICATION.

Economies resulting from electrification of interurban railroad previously a steam railroad, see SECURITY ISSUES, 4.

Authorization of bonds and discounts to provide for electrification of railway where difference was to be amortized and could be absorbed by savings, see SECURITY ISSUES, 15.

ELEVATED SECTIONS.

Agreement between residents of elevated section outside of city limits, but within metropolitan area, and water utility consenting to higher rates for service in consideration of additional equipment, see SERVICE, 17.

EMINENT DOMAIN.

1. An electric utility desiring to enlarge its plant in the interest of public convenience and necessity may acquire underlying strata from which coal and fire clay is mined in order to eliminate the danger of subsidence to the new extension, under an act (1921) giving to an electric company the right to appropriate property necessary for its corporate use in the "maintenance" as well as the "construction" of its buildings and plants. *Re Duquesne Light Co.* (Pa.) 383.

EMPLOYEES.

Lack of Commission jurisdiction over questions of employees' wages, see COMMISSIONS, 13.

ENGINEERING.

Proper and legitimate expenditures made necessary in accomplishing results authorized by charter as proper basis for issue of capital securities, see SECURITY ISSUES, 13, 14.

Treatment of overheads in valuation, see VALUATION, 24-35.

EQUIPMENT AND CONSTRUCTION.

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EQUIPMENT AND CONSTRUCTION—continued.

- to operate prior to effective date of regulatory act as not actual construction, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 20.
- Substitution of judgment of others for that of telephone company in determination of whether certain wires are suitable and are properly installed as interference with right of management going beyond reasonable limit of public control, see **COMMISSIONS**, 12.
- Order requiring telephone company to become owner of privately installed service equipment as unreasonable interference with property rights, see **CONSTITUTIONAL LAW**, 6.
- Percentage allowance for depreciation of items of natural gas property, see **DEPRECIATION**, 11-15.
- Authorization of increase in telephone rates where reconstruction of system from grounded to metallic lines is necessary and consented to by subscribers, see **RATES**, 14.
- Necessity of Commission consideration of recapture provision of city traction contract in passing upon application to issue securities for needed equipment, see **SECURITY ISSUES**, 9.
- Commission jurisdiction over equipment to be installed for telephone service, see **SERVICE**, 6, 7.
- Accessories and service connections, see **SERVICE**, 34-37.
- Valuation of office equipment without deduction for depreciation where appreciation in old furniture will equal physical depreciation, see **VALUATION**, 19.
- Deductions from estimates in valuing second-hand tools and equipment, see **VALUATION**, 43.

ESTOPPEL.

- Estoppel to recover excess water rates or additional damages which might otherwise lawfully be claimed where money has been paid to city without questioning right to collect, see **REPARATION**, 3.

EVIDENCE.

- Court as not bound by decision of Commission that evidence is immaterial, see **APPEAL AND REVIEW**, 3.
- Suggestion in brief filed for industry appealing judgment dismissing suit against railroad for expense of side track maintenance that carrier is liable for repair expense under orders of Director General of Railroads as not properly before court, see **APPEAL AND REVIEW**, 5.
- Evidence of necessity for certificates, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 14, 15.
- Commission as not limited in its prerogative to regulate rates by admission of any witness, see **COMMISSIONS**, 1.
- Evidence and facts applicable, and not terms of contract, as governing Commission decision as to complaint against insufficient water supply, see **SERVICE**, 22.
- Accepted rules of evidence as not to be entirely disregarded by present-P.U.R.1928B.

EVIDENCE—*continued.*

ing reproduction cost estimate based on expert testimony unsupported by testimony of persons acquainted with property, see VALUATION, 7.

Opinion evidence as to value of rights of way, see VALUATION, 79.

1. A wrongful admission of oral testimony as to the construction policy of the highway department with reference to grades (the rules of that department being in writing) was held not to be consequential error where the state testimony was not vital to the question in issue at the Commission hearing. *Chicago & N. W. R. Co. v. Illinois Commerce Commission* (Ill. Sup. Ct.) 153.

2. The same rules as to the admissibility of evidence as obtain in a court should be observed by the Commission in its hearings. *Chicago & N. W. R. Co. v. Illinois Commerce Commission* (Ill. Sup. Ct.) 153.

3. Cross examination of a Commission's witness upon an exhibit not at that time placed in evidence, nor concerning which the witness had testified, was correctly denied to a railroad attacking Commission's order in lower court. *Chicago & N. W. R. Co. v. Illinois Commerce Commission* (Ill. Sup. Ct.) 153.

4. Questions concerning facts within the common knowledge of man were correctly denied on cross examination of expert witnesses. *Chicago & N. W. R. Co. v. Illinois Commerce Commission* (Ill. Sup. Ct.) 153.

5. A question as to what an applicant for water service did, upon returning from a trip to find water supply yet unfurnished, was pertinent to show what effort was made to have water supplied. *Merryman v. Baltimore City* (Md. Ct. App.) 546.

6. A denial by a water consumer suing for damages for failure of supply by a city, that he has received a letter alleged to have been mailed by the city plant officials, is admissible in evidence. *Merryman v. Baltimore City* (Md. Ct. App.) 546.

7. Evidence by a city plant as to its procedure upon application for service is proper where it is being sued for damages resulting from an alleged failure to supply water. *Merryman v. Baltimore City* (Md. Ct. App.) 546.

8. Rules of the city water department may properly be placed in evidence in a damage suit by a consumer for failure to supply water. *Merryman v. Baltimore City* (Md. Ct. App.) 546.

9. Statements under oath carry much more weight, especially when there is an opportunity for cross examination, than circulating petitions in view of the fact that it is an easy matter to secure signatures to almost any kind of a petition. *Re Billings-Sheridan Bus Line* (Mont.) 816.

10. Evidence of whether or not a village electric utility ever rendered local service in another town is immaterial in the determination of whether the utility is by law obligated and empowered to render local service. *Eagle River v. Railroad Commission* (Wis. Cir. Ct.) 561.

11. Testimony as to whether or not a village utility ever rendered service to another town should only be considered as parol evidence tending to show the intent of the village in accepting a franchise from the town. *Eagle River v. Railroad Commission* (Wis. Cir. Ct.) 561.

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EXCESS CAPACITY.

Deduction in valuation because of excess capacity, see VALUATION, 20.

EXCHANGES.

Evasion of statutory provisions relating to stock purchases and qualification of directors as affecting consolidation of telephone exchanges, see CONSOLIDATION, MERGER, AND SALE, 5.

EXCLUSIVE FRANCHISES.

See also FRANCHISES.

Refusal of court to interfere by injunction to restrain operation of corporations claiming right to exercise competitive franchise where previous grant was not exclusive, see INJUNCTION, 1.

EXPENSES.

See also COSTS AND EXPENSES; OPERATING EXPENSES.

Of commercial aviation, see AVIATION, 2.

EXPERTS.

Questions concerning facts within the common knowledge of man as correctly excluded on cross examination of expert witnesses, see EVIDENCE, 4.

Accepted rules of evidence as not to be entirely disregarded by presenting reproduction cost estimate based on expert testimony unsupported by testimony of persons acquainted with property, see VALUATION, 7.

EXPRESS.

Lack of Commission jurisdiction over freight and express rates of motor carriers, see RATES, 8.

EXTENSIONS.

Extensions of service generally, see SERVICE, 17-19.

FAIR VALUE.

Present fair value rather than money invested in utility property as basis on which to calculate rates, see RETURN, 3.

FEDERAL GOVERNMENT.

Power of state over water power development subject only to limited sovereign powers conferred upon Federal Government by Constitution, see WATER POWERS, 2.

FEDERAL TAXES.

Construction of rate contract which is ambiguous with respect to payment of taxes and reimbursement by city, see CONTRACTS, 2-6.

Taxes as an operating expense, see RETURN, 27, 28.

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FEES.

Proper and legitimate expenditures made necessary in accomplishing results authorized by charter as proper basis for issue of capital securities, see SECURITY ISSUES, 13, 14.

FERRIES.

Necessity of certificate for ferry operation, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 7, 8.

Operation of ferries in good faith prior to regulation, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 16.

FILING.

Water system which has operated without filing rates with Commission until recent years as impressed with public utility obligations which cannot be discontinued without Commission consent, see PUBLIC UTILITIES, 1.

Tariff filed by association of owners of towboats as indicating status of common carriers, see PUBLIC UTILITIES, 11.

FINANCING.

Treatment of, in valuation, see VALUATION, 22.

FINDINGS OF FACTS.

Review by courts, see APPEAL AND REVIEW.

FINES AND PENALTIES.

Penalty for illegal operation, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 26, 27.

Jurisdiction of Commission to enforce penalty for illegal bus operation, see COMMISSIONS, 2.

FIRE PROTECTION.

Rules and regulations of water utility, see SERVICE, 46-52.

FIRE SERVICE.

Statutory enactment that rates should not be unreasonable or unjustly discriminatory as rebutting presumption of prior legislative authority for free fire service to municipalities, see DISCRIMINATION, 4.

Absence of presumption that statutory requirement that municipalities guarantee dividends to water utility was meant as consideration for free fire service, see RETURN, 1.

FORECLOSURE.

Company which by means of foreclosure sale becomes possessed of public utility water system as required to render service unless and until authorized to discontinue, see SERVICE, 20.

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FORMER OWNER.

Subsequent consumer as not liable for bills of previous owner, see **PAYMENT**, 4.

FRANCHISES.

Franchise as a condition precedent to obtaining certificate for electric utility operation, see **CERTIFICATE OF CONVENIENCE AND NECESSITY**, 9.

Negotiations for construction of utility and procurement of franchise to operate prior to effective date of regulatory act as not actual construction, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 20.

Necessity of certificate for a utility which has not actually operated prior to effective date of regulatory act even though a valid franchise has been obtained and the plant actually constructed, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 21.

Jurisdiction of Commission to relieve from franchise obligations, see **COMMISSIONS**, 8.

Validity of duplicate unexclusive franchises, see **CONSTITUTIONAL LAW**, 9.

Refusal of court to interfere by injunction to restrain operation of corporations claiming right to exercise competitive franchise where previous grant was not exclusive, see **INJUNCTION**, 1.

Street railway franchises as subject to legislative regulation as to rates, see **RATES**, 2.

Utility as not to accept only such parts of franchise as convey rights without assuming obligations, see **SERVICE**, 16.

Fact that utility devotes property to public use by operating street railway system which it has purchased after expiration of franchise as not constituting irrevocable or absolute dedication of property to use of public, see **SERVICE**, 24.

Electric railway as still under obligation to furnish street railway service in city through which it operates interurban cars if this can be done without placing too great burden upon system notwithstanding franchise has been surrendered, see **SERVICE**, 29.

Obligations of franchise as affecting right to discontinue service because of operation at a loss, see **SERVICE**, 31, 32.

1. Every grant from a sovereign power is to be construed strictly against the grantee, and in favor of the city or government, and the rights of the public are not to be presumed to be surrendered except in so far as the intention to surrender them appears in the charter. *El Dorado v. Coats* (Ark. Sup. Ct.) 351.

2. An abandonment of public rights ought not to be presumed in a case if the deliberate purpose of the state or council does appear where a corporation alleges that the state or a city council has surrendered its powers of improvement and public accommodation. *El Dorado v. Coats* (Ark. Sup. Ct.) 351.

3. A contract is created between a city and a party or corporation to whom a franchise has been given or rights granted by ordinance. *El Dorado v. Coats* (Ark. Sup. Ct.) 351.

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FRANCHISES—continued.

4. A law (Crawford & Moses' Digest, § 7492) providing that a city council may or may not grant an exclusive franchise as in their judgment seems best does not make a franchise exclusive where it does not plainly show that the council so intended. *El Dorado v. Coats* (Ark. Sup. Ct.) 351.

5. The authority to grant a franchise, or to grant more than one franchise permitting the use of the streets and alleys by competitive public utilities, is vested in the municipality and not the Commission. *Minor v. Erickson* (N. D.) 832.

FREE SERVICE.

Statutory enactment that rates should not be unreasonable or unjustly discriminatory as rebutting presumption of prior legislative authority for free fire service to municipalities, see **DISCRIMINATION**, 4.

FREIGHT.

Lack of Commission jurisdiction over freight and express rates of motor carriers, see **RATES**, 8.

FURNITURE.

Valuation of office equipment without deduction for depreciation where appreciation in old furniture will equal physical depreciation, see **VALUATION**, 19.

GAS.

Grant of certificate for operation of gas utility although a private company in taking over a system previously constructed by a city has functioned without authority, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 11.

Burden of proof on one seeking special gas rate, see **RATES**, 19.

Gas rates, see **RATES**, 26, 27.

Necessity of valuation, even though company is willing to forego return so as to fix rates on theory that various items of expense should be allocated to respective classes of customers in view of expenses varying with size and value of property, see **RETURN**, 9.

Right of gas utility to discontinue service where consumer refuses or neglects to maintain condition at residence admitting of regular meter reading, see **SERVICE**, 33.

GASOLINE.

Treatment of gasoline revenues in fixing rates of natural gas company, see **RETURN**, 4.

GEOGRAPHICAL LOCATION.

Burden on appellant to overcome presumption in favor of Commission order denying application for creation of special zone for city on account of location as applied to source of natural gas, see **APPEAL AND REVIEW**, 6.

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GIFTS.

Donations as not chargeable as an operating expense, see RETURN, 33.

GOING VALUE.

Treatment of, in valuation, see VALUATION, 65-74.

GOOD FAITH.

Illegal operation in good faith as not necessarily a bar to receiving certificate, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 12.

GOVERNMENTAL CAPACITY.

Proprietary or governmental capacity of city operating municipal plant, see MUNICIPAL PLANTS, 3.

GRADES.

Grades at crossings, see CROSSINGS.

GRANTEES.

Presumption against grantee of franchise in deciding whether sovereign powers have been surrendered, see FRANCHISES, 1, 2.

GRAVEL.

Railroad switching rates on, see RATES, 31.

GROSS REVENUES.

See also RETURN, 4.

Operating expenses and other deductions from gross revenues, see RETURN, 19-34.

GROUNDED LINES.

Authorization of increase in telephone rates where reconstruction of system from grounded to metallic lines is necessary and consented to by subscribers, see RATES, 14.

GUARANTEES.

Absence of presumption that statutory requirement that municipalities guarantee dividends to water utility was meant as consideration for free fire service, see RETURN, 1.

HAULING.

Charges for cost of labor, hauling freight, and similar items incurred in drilling of natural gas wells as not included in rate base when these items have been charged to operating expense, see VALUATION, 38.

HIGHWAYS AND STREETS.

Decision by Public Service Commission of sister state compelling street railway company upon discontinuance to leave surface of streets F.U.R.1928B.

HIGHWAYS AND STREETS—continued.

- in condition similar to remainder of highway under statute in that state as not applying where there is no such statute, see COMMISSIONS, 6.
- Wrongful admission of oral testimony as to construction policy of highway department with reference to grades as not prejudicial error, see EVIDENCE, 1.
- Commission as having no jurisdiction to entertain petition for regulation of rates over toll bridge which is not proven to have been taken over as part of state highway system in view of statutes, see RATES, 4.
- Cost of street paving as an operating expense of a railway system, see RETURN, 30.
- Right of Commission to permit withdrawal of street railway company property from use of public as accompanied by authority to fix reasonable terms, see SERVICE, 8.
- Duty of street railway to leave streets, avenues, and highways, in good condition of repair, upon withdrawal of property, see SERVICE, 25.
- Reduction in estimated allowance for private road of water utility, see VALUATION, 42.
- Valuation of street railway easements, see VALUATION, 58-64.

HOLDING COMPANY.

- See also INTERCORPORATE RELATIONS.
- Lack of Commission jurisdiction to prevent sale of stock to individual in interest of nonresident holding company, see CONSOLIDATION, MERGER, AND SALE, 10.

HYDROELECTRIC POWER.

- Requirement that corporations apply for certificates relating to development of hydroelectric energy, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 1.

ILLEGAL PRACTICES.

- Failure of Commission to deny certificate because of prior illegal operation as not legalizing operation made unlawful by statute, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 2.
- Jurisdiction of Commission to enforce penalty for illegal bus operation, see COMMISSIONS, 2.
- Evasion of statutory provisions relating to stock purchases and qualification of directors as affecting consolidation of telephone exchanges, see CONSOLIDATION, MERGER, AND SALE, 5.

IMPAIRMENT OF CONTRACTS.

- Impairment of contracts generally, see CONSTITUTIONAL LAW, 9.

IMPROVED SERVICE.

- Authorization of increase in telephone rates where reconstruction of system from grounded to metallic lines is necessary and consented to by subscribers, see RATES, 14.

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INCOME.

Lowering of taxes because taxes dependent on income, see RETURN, 27.

INCORPORATION COSTS.

Proper and legitimate expenditures made necessary in accomplishing results authorized by charter as proper basis for issue of capital securities, see SECURITY ISSUES, 13, 14.

Treatment of overheads in valuation, see VALUATION, 24-35.

INDEMNITY.

Construction of rate contract which is ambiguous with respect to payment of taxes and reimbursement by city, see CONTRACTS, 2-6.

Service requirements on condition that owners file bond to indemnify sewage company against loss from arrearages, see PAYMENT, 5.

Indemnity for liability under conditional sales contract, see SECURITY ISSUES, 5.

INDEX FIGURES.

Check on reproduction cost by index figures, see VALUATION, 2.

INDIANA.

Evasion of laws regulating stock buying in competitors by holding companies, see INTERCORPORATE RELATIONS, 1, 2.

INJUNCTION.

1. Equity courts will not interfere by injunction to restrain the operation of corporations claiming the right to exercise a competitive franchise granted under the legislative authority conferred by the council, where a previous grant had not been exclusive. *El Dorado v. Coats* (Ark. Sup. Ct.) 351.

2. Operation of a motor bus utility unauthorized by the Commission or any governmental authority cannot be enjoined by a court in a suit for injunction filed by a competing railroad unless the latter can show some irreparable, impending loss if the former's activity be allowed to continue. *Long Island R. Co. v. Glen Cove & N. Y. Coach Corp.* (N. Y. Sup. Ct. Sp. T.) 255.

3. Injunction will not issue because of an alleged "irreparable loss" by a railroad as a result of the illegal operation of a motor bus carrier unless there is clear evidence of diminution in revenue of the latter as a direct result of the activity of the former. *Long Island R. Co. v. Glen Cove & N. Y. Coach Corp.* (N. Y. Sup. Ct. Sp. T.) 255.

INSURANCE.

Sufficiency of insurance policy for public liability of motor carriers, see AUTOMOBILES, 1.

INSURANCE DURING CONSTRUCTION.

Treatment of overheads in valuation, see VALUATION, 24-35.
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INTANGIBLE PROPERTY.

Valuation of, see VALUATION, 58-79.

INTERCORPORATE RELATIONS.

Evidence as to ownership of stock in telephone utility as material to consideration of petition for authority to purchase such stock by two other telephone companies, see CONSOLIDATION, MERGER, AND SALE, 3.

Lack of Commission jurisdiction to prevent sale of stock to individual in interest of nonresident holding company, see CONSOLIDATION, MERGER, AND SALE, 10.

Reduction of electric rates because of improvident service contract for power from affiliated company, see RATES, 13.

Payments to related companies as an operating expense, see RETURN, 25, 26.

Management fee and percentage of gross revenues payable to another company as not a proper operating expense of a natural gas company, see RETURN, 32.

Power of Commission to examine bond sale between affiliated companies with consideration of interest of city as copartner in property, see SECURITY ISSUES, 10.

Valuation of mains and pipes of natural gas company at actual cost as preferred over theoretical prices based on general quotations where public utility through affiliations is enabled to secure material advantageously, see VALUATION, 45.

1. An admission by an official of a telephone company that the plant superintendent of his company was also a director "by courtesy" of a holding company on the board of another utility to "represent the interest" of the first utility which claimed to have no money invested in the second, led to the conclusion that the spirit if not the letter of a law (§ 95, Public Service Commission Act) providing that no public utility should by any means acquire "property, stock, or bonds" of another similar utility without Commission authority, had not been followed. Re Northwestern Indiana Teleph. Co. (Ind.) 717.

2. A law (§ 18, Public Service Commission Act) providing that the majority of the board of directors of every utility operating within the state should be bona fide residents and citizens of that state is violated when three of five directors of domestic telephone company are residents and citizens of another state. Re Northwestern Indiana Teleph. Co. (Ind.) 717.

INTEREST.

Sale price and interest rate of security issues, see SECURITY ISSUES, 15-18.

INTEREST DURING CONSTRUCTION.

Treatment of overheads in valuation, see VALUATION, 24-35.
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INTERMEDIATE POINTS.

Wharf or landing place which appears to be out-of-line in normal navigation course between two major points as not given status of intermediate point under law providing for special rates to such points, see **RATES**, 24.

Duty of motor carrier to transport passengers between intermediate points, see **SERVICE**, 39.

INTERSTATE COMMERCE.

Compliance with law requiring certificate to do interstate business as not giving the right to haul interstate passengers, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 3.

Annotation on jurisdiction of state with respect to interstate commerce, p. 18.

1. An injunction issued by a court on an order of the Commission denying a certificate to a motor transportation company to do intrastate business was held not intended to enjoin such utility from engaging in interstate commerce and it was further held that had such prohibition been intended, then to that extent the decree of the court would be inoperative. *Western Transp. Co. v. People* (Colo. Sup. Ct.) 768.

2. A prohibition against interstate motor carriers also incidentally conducting a purely intrastate business without securing a license from the proper state authorities therefor, is not a prohibition upon interstate commerce but a lawful regulation by the state of its highways. *Western Transp. Co. v. People* (Colo. Sup. Ct.) 768.

3. The fact that the expense incident to the separation of grades might involve the sale of bonds under control of Interstate Commerce Commission (U. S. Transportation Act of 1920) does not deprive the Illinois Commission of jurisdiction to order such separation where there is no competent evidence tending to show that a sale of any security under control of the Interstate Commerce Commission would in fact be necessary. *Chicago & N. W. R. Co. v. Illinois Commerce Commission* (Ill. Sup. Ct.) 153.

4. The authority of a railroad to project its trains across thoroughfares in interstate commerce must be subject to such limitation as may be imposed upon it by the state in the interest of the safety of its citizens. *Chicago & N. W. R. Co. v. Illinois Commerce Commission* (Ill. Sup. Ct.) 153.

5. Orders of the Commission regarding the proper installation of wiring are not void because they affect interstate transmission of telephonic messages in view of the fact that Congress has not legislated on the regulation of telephones used in interstate commerce. *New England Teleph. & Teleg. Co. v. Department of Public Utilities* (Mass. Sup. Jud. Ct.) 396.

6. Orders of the Commission directly affecting interstate commerce within the sphere covered by congressional legislation are void. *New England Teleph. & Teleg. Co. v. Department of Public Utilities* (Mass. Sup. Jud. Ct.) 396.

7. The Commission has no jurisdiction to grant a remedy to a complaint against telephone service which affects interstate commerce under a law (G. L. Chap. 159, § 16) confining the supervisory and regulative power conferred to service in transmission "within the commonwealth." *New P.U.R.1928B*.

INTERSTATE COMMERCE—continued.

England Teleph. & Teleg. Co. v. Department of Public Utilities (Mass. Sup. Jud. Ct.) 396.

8. The requirements of the Missouri Bus Law as to securing a certificate of convenience and necessity, paying special license fees for the use of the road, the observance of general rules and regulations promulgated by the Commission, and the furnishing of proper liability insurance are applicable even to interstate motor carrier operation and do not place an undue or unjust burden upon interstate commerce. *Re Pickwick Stages System (Mo.)* 1.

9. The Commission has no power to interfere with the motor bus operations of an applicant for a certificate of convenience and necessity confined to the transportation of passengers between terminals in different states. *Re Inter-City Coach Co. (R. I.)* 859.

10. It is the duty of the Commission to assume that an applicant for a certificate of convenience and necessity for an interstate route intends to confine itself to engaging in interstate commerce. *Re Inter-City Coach Co. (R. I.)* 859.

11. Granting an application for a certificate of convenience and necessity for a proposed interstate bus route with certain specific conditions deemed necessary to protect legitimate intrastate commerce from invasion does not create an undue burden on interstate commerce. *Re Inter-City Coach Co. (R. I.)* 859.

INTERSTATE SYSTEM.

Apportionment applied to transmission system of natural gas company having property in two states as applied to line loss, see **APPORTIONMENT**, 2.

INTERURBAN RAILWAYS.

Preference of motor utility operator already successful in other territory rather than interurban railway company which proposes to operate busses, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 24.

Economies resulting from electrification of interurban railroad previously a steam railroad, see **SECURITY ISSUES**, 4.

Authorization of bonds to provide for electrification of railway where discount was to be amortized and could be absorbed by savings, see **SECURITY ISSUES**, 15.

INVESTMENT.

Book cost or original investment as the basis for computing depreciation, see **DEPRECIATION**, 1.

Present fair value rather than money invested in utility property as basis on which to calculate rates, see **RETURNS**, 3.

JOINT USE.

Joint use of tools and equipment as a ground for deduction from value, see **VALUATION**, 43.

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JURISDICTION.

- Of Commissions over accounting, see ACCOUNTING, 2.
- Of Commissions generally, see COMMISSIONS, 2-14.
- Of Commissions over consolidation, merger, and sale, see CONSOLIDATION, MERGER, AND SALE, 10.
- Of Commissions with respect to crossings, see CROSSINGS, 3.
- Of Commissions over rates, see RATES, 4-10.
- Of Commissions over reparation, see REPARATION, 1, 2.
- Of Commissions over return, see RETURN, 2.
- Of Commissions over security issues, see SECURITY ISSUES, 8-12.
- Of Commissions over service, see SERVICE, 2-8.
- Jurisdiction to safeguard public rights in regard to water powers, see WATER POWERS, 1-3.

LABOR.

- Lack of Commission jurisdiction over questions of employees' wages, see COMMISSIONS, 13.
- Expenditures for labor and other expenses in drilling new gas wells as chargeable to gas well construction instead of to operating expenses, see RETURN, 34.
- Treatment of overheads in valuation, see VALUATION, 24-35.
- Charges for cost of labor, hauling freight, and similar items incurred in drilling of natural gas wells as not included in rate base when these items have been charged to operating expense, see VALUATION, 38.

LAND.

- Treatment of application of power utility to issue additional securities because of alleged increase to value of land, see SECURITY ISSUES, 6.
- Application of cost of reproduction theory to land, see VALUATION, 6.
- Transmission rights-of-way and land of natural gas utility as not depreciated, see VALUATION, 18.

LANDING FIELDS.

- Requirements of landing fields for aviation service, see AVIATION, 3.

LARGE CONSUMERS.

- Allocation of customer cost in determining gas rate structure, see RATES, 26, 27.

LEAKAGE.

- Apportionment applied to transmission system of natural gas company having property in two states as applied to line loss, see APPORTIONMENT, 2.

LEASEHOLDS.

- Valuation of, see VALUATION, 75-78.
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LEASES.

Valuation of, see VALUATION, 75-78.

LEGAL EXPENSES.

Proper and legitimate expenditures made necessary in accomplishing results authorized by charter as proper basis for issue of capital securities, see SECURITY ISSUES, 13, 14.

Treatment of overheads in valuation, see VALUATION, 24-35.

LEGAL QUESTIONS.

Jurisdiction and powers of Commissions over legal questions, see COMMISSIONS, 10.

LEGISLATURE.

Power over rates, see RATES, 1, 2.

Courts as not to interfere with legislative authorization as to rates except in clear cases such as unreasonable exercise of police power, see RATES, 3.

LETTERS.

Denial of receipt of letter from city plant officials as admissible in evidence in suit for damages for failure to serve, see EVIDENCE, 6.

LIABILITY.

Limitation on liability for towing service as not depriving towboats of public utility status, see PUBLIC UTILITIES, 12.

LICENSES.

Licenses for diversion of state water power as not granted wholly for benefit of licensees but pursuant to policy of state favoring generation of low priced hydroelectric power, see WATER POWERS, 4.

LIMITATIONS.

Limitations and conditions attaching to certificates, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 25.

Limitation on liability for towing service as not depriving towboats of public utility status, see PUBLIC UTILITIES, 12.

LOCAL CONSENT.

For service under certificates of convenience and necessity, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 9, 10.

LOGS.

Rate regulation applicable to log transportation by towboats as not unconstitutional, see CONSTITUTIONAL LAW, 8.

LONG DISTANCE SERVICE.

Apportionment of terminal fees between telephone companies, see AP-
PORTIONMENT, 1.

Rates for long distance telephone service, see RATES, 34-36.

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LOSSES.

Refusal to enjoin operation of motor bus utility unauthorized by Commission or other governmental authority in suit filed by competing railroad unless irreparable loss is shown, see **INJUNCTION**, 2, 3.

MAGNETO SERVICE.

Probable necessity for reconstruction of telephone system from magneto to common battery, as affecting valuation, see **VALUATION**, 15.

MAINS AND PIPES.

Apportionment applied to transmission system of natural gas company having property in two states as applied to line loss, see **APPORTIONMENT**, 2.

Ascertainment of accrued depreciation of natural gas mains, see **DEPRECIATION**, 9.

Percentage allowance for depreciation of items of natural gas property, see **DEPRECIATION**, 11-15.

Commission jurisdiction over operator of municipally owned mains, see **PUBLIC UTILITIES**, 2.

Service to applicant residing on that side of boundary street which is just outside of corporate limits of village in which utility has previously served where service not restricted by charter or certificate and mains are available, see **SERVICE**, 18, 19.

Rules relating to water service connections with mains, see **SERVICE**, 35-37.

Rules and regulations of water utility, see **SERVICE**, 46-52.

Valuation of mains and pipes, see **VALUATION**, 45.

Valuation of parallel mains, see **VALUATION**, 47, 51.

MAINTENANCE.

Condemnation of property for maintenance of utility service, see **EMINENT DOMAIN**, 1.

Expense of spur track maintenance, see **SERVICE**, 40.

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Power of Commissions over managerial questions, see **COMMISSIONS**, 11-14.

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Failure to provide metered service to domestic consumers as not unreasonable where tariff discloses no discrimination and saving of water from such charge would not offset additional investment and expense, see RATES, 22.

Charge for reinstalling water meters in absence of explanation as not permitted, see RATES, 23.

Right of gas utility to discontinue service where consumer refuses or neglects to maintain condition at residence admitting of regular meter reading, see SERVICE, 33.

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MONOPOLY AND COMPETITION.

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Mere convenience of additional service without showing of inadequacy of existing service as not a ground for granting certificates, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 15.

Question of exclusive franchise, see FRANCHISES.

Refusal of court to interfere by injunction to restrain operation of P.U.R.1928B.

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- corporations claiming right to exercise competitive franchise where previous grant was not exclusive, see *INJUNCTION*, 1.
- Refusal to enjoin operation of motor bus utility unauthorized by Commission or other governmental authority in suit filed by competing railroad unless irreparable loss is shown, see *INJUNCTION*, 2, 3.
- Order to charge equal meter rates for test period in view of discriminatory and wasteful flat rates and existence of competition, see *RATES*, 38.
- Commission power to require competitive bidding at sale of utility bonds, see *SECURITY ISSUES*, 11.
- Filing of opposing application for certificate to operate motor busses over substantially same territory as that served by street railway as admission of force of position taken by another applicant that street railway service is inadequate, see *SERVICE*, 15.
- Purchase of competitor's right as not a part of rate base, see *VALUATION*, 39.
- Valuation of parallel water mains, see *VALUATION*, 47.
- Valuation of parallel gas mains, see *VALUATION*, 51.
- Annotation on possibility of lower rates as affecting competition, p. 657.
- Annotation on inadequacy of existing service, p. 658.
- Annotation on competition by transportation companies, p. 659.
- Annotation on restrictions and conditions, p. 660.
- Discussion of authorities and decisions showing that the theory of competition as a regulator of rates and service of the public utility industry has been generally recognized as ineffective, p. 841.
1. Where a structure or group of structures which might reasonably be considered as requiring one complete service such as a toll house which is a necessary adjunct to a bridge, are so located as to lie across a territorial boundary of two competitive utilities, the consumer should be permitted to take service from either side of such boundary line. *Vallejo Electric Light & P. Co. v. Great Western Power Co. (Cal.)* 655.
 2. The Commission approved in the interest of public convenience and necessity a contract between a private and a city electric utility whose proposed lines closely paralleled each other for several miles, whereby the territory common to the two plants was divided in equitable fashion and the routes of the lines accordingly readjusted. *Re Public Service Co. (Colo.)* 574.
 3. A stipulated division of rural territory by two utilities, parties to an anticompetitive agreement, whereby a privately owned utility agreed to give a city plant first chance to serve the customers, was excluded from certificates of convenience and necessity of both where the city did not appear to desire or consent to such service in the near future and where the Commission believed it unwise to pre-empt such territory in favor of a utility which might never be willing to serve it. *Re Public Service Co. (Colo.)* 574.
 4. A strong showing of inadequacy of existing service should be made by an applicant for a rival certificate of convenience and necessity before *P.U.R.* 1928B.

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a separate operation over an existing carrier route will be authorized in view of the fact that the Commission has power to regulate service and has always stood ready to hear any complaints and to make such orders as will remedy reasonably a minor defective service. *Re Pless and Davis (Colo.)* 783.

5. The Public Utilities Act confers upon the Public Service Commission the power to determine whether a community already occupied and served by one utility may be invaded by another utility giving the same kind of service, and whether the public interest or that of the utilities would be subserved by the construction and installation of a second system in the community. *Kansas Gas & E. Co. v. Public Service Commission (Kan. Sup. Ct.)* 492.

6. It is within the power of the Commission to determine whether a permission to a second utility would operate as a needless economic waste, disadvantageous alike to the public and the utility, and if these facts were found to exist to make an order regulating the service, in effect substituting regulation for competition, and even going to the extent of excluding the applying utility from the zone or territory already occupied and being served by another utility with the permission of the Commission. *Kansas Gas & E. Co. v. Public Service Commission (Kan. Sup. Ct.)* 492.

7. A company operating interstate motor busses should not be authorized to do an intrastate business in competition with motor carriers and railroads successfully handling all traffic that is offered, and able to meet future traffic demands, when the entry of another motor carrier into the intrastate traffic would reduce the revenues of the existing carriers thereby checking their expansion and impairing their service. *Re Pickwick Stages System (Mo.)* 1.

8. Telephone service by a second company which has secured a franchise to establish an exchange should be permitted, notwithstanding the expense usually incident to the duplication of such facilities in one community, where existing service, furnished from an exchange in another city, is inadequate and there is no assurance of improvement, by the utility occupying the field, within a reasonable time. *Re Missouri City Teleph. Co. (Mo.)* 810.

9. Service to the public is of first importance and considerations looking towards the protection of a transportation monopoly which has not rendered adequate service should not be accorded any great weight on an application by another carrier for authority to serve. *Re Jewett (Vt.)* 225.

10. Under § 82, Chap. 17, of the Acts of the Legislature of 1925, no permit to operate motor vehicles for public transportation for hire shall be issued by the State Road Commission until it be established upon a proper investigation that the privilege so sought by the applicant is necessary or convenient for the public, and that the proposed service is not then being adequately performed by any other persons, partnership, or corporation. *Monongahela West Penn Pub. Service Co. v. State Road Commission (W Va Ct. App.)* 161.

11. The public policy of this state, as expressed in legislative enact-
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ments, requires that public utilities be given reasonable protection from detrimental competition. Wherefore, when an existing carrier is one of several applicants for the initial permit to operate motor busses over a highway between points served by the railroad of the carrier, and it is fully qualified to render the additional service proposed, the State Road Commission should ordinarily give the preference to the carrier. *Monongahela West Penn Pub. Service Co. v. State Road Commission* (W. Va. Ct. App.) 161.

MORTGAGES.

Provisions relating to mortgage bonds of company purchasing street railway at receiver's sale, see **SECURITY ISSUES**, 3.

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Local consent before receiving certificate, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 9, 10.

Refusal of Commission to grant license for operation of motor vehicles through a town against the express wishes of local authorities, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 13.

Commission as not attempting to assume powers that have been reserved to municipalities with respect to motor bus regulation, see **COMMISSIONS**, 3.

Validity of duplicate unexclusive franchises, see **CONSTITUTIONAL LAW**, 9.

Police power with respect to city contracting away its rights as to rates, see **CONSTITUTIONAL LAW**, 10-14.

Capacity of municipality to enter into contract, see **CONTRACTS**, 1.

Construction of rate contract which is ambiguous with respect to payment of taxes and reimbursement by city, see **CONTRACTS**, 2-6.

Statutory enactment that rates should not be unreasonable or unjustly discriminatory as rebutting presumption of prior legislative authority for free fire service to municipalities, see **DISCRIMINATION**, 4.

Discrimination in granting lower rates for public utility service to municipal and other public corporations, see **DISCRIMINATION**, 5.

Franchises from municipalities, see **FRANCHISES**.

Commission jurisdiction over operator of municipally owned mains, see **PUBLIC UTILITIES**, 2.

Street railway franchises as subject to legislative regulation as to rates, see **RATES**, 2.

Absence of presumption that statutory requirement that municipalities guarantee dividends to water utility was meant as consideration for free fire service, see **RETURN**, 1.

Necessity of Commission consideration of recapture provision of city traction contract in passing upon application to issue securities for needed equipment, see **SECURITY ISSUES**, 9.

Relevancy of question whether station at which passengers or freight
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are loaded and unloaded is inside or outside of corporate limits of cities or towns, see **SERVICE**, 38.

Duty of utility to operate booster pump to supply reservoir, see **SERVICE**, 45.

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Evidence in suit for damages for failure of municipal plant to furnish water, see **EVIDENCE**, 5-8.

Materiality of evidence as to duty to serve, see **EVIDENCE**, 10, 11.

Municipal plant rates, see **RATES**, 28.

Order to charge equal meter rates for test period in view of discriminatory and wasteful flat rates and existence of competition, see **RATES**, 38.

Estoppel to recover excess water rates or additional damages which might otherwise lawfully be claimed where money has been paid to city without questioning right to collect, see **REPARATION**, 3.

Duty of municipal water utility to supply water impartially, see **SERVICE**, 10.

Duty to notify consumer of requirements of service, see **SERVICE**, 43.

1. A certificate of convenience and necessity for a borough to acquire and operate a local electric utility and a refusal of authority to another private utility to buy the capital stock of the same is the extent to which a Commission may aid the municipal acquisition of a private utility. *Brookville v. Solar Electric Co. (Pa.)* 621.

2. The Public Utilities Commission is charged with the duty of regulating the practices, rates, and charges of municipally owned as well as privately owned public utilities operating for hire in the state of Utah (§ 4782, Compiled Laws of Utah, 1917). *Logan City v. Utah Power & Light Co. (Utah)* 410.

3. A city or other municipal corporation going into a utility business takes upon itself the character of an ordinary commercial concern in its proprietary capacity and to that extent ceases to function in its governmental capacity. *Logan City v. Utah Power & Light Co. (Utah)* 410.

NAME.

Restriction of joint tradename in the absence of partnership, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 25.

NATURAL GAS.

Burden on appellant to overcome presumption in favor of Commission order denying application for creation of special zone for city on account of location as applied to source of natural gas, see **APPEAL AND REVIEW**, 6.

Apportionment applied to transmission system of natural gas company having property in two states as applied to line loss, see **APPORTIONMENT**, 2.

Disapproval of allowance for amortization of physical property of nat. P.U.R.1928B.

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- ural gas company partly because of adequate past provision, see DEPRECIATION, 4.
- Necessity of operating charges sufficient to care for depreciation and provide for retirement of additions to capital including gas well construction, see DEPRECIATION, 5.
- Ascertainment of accrued depreciation of natural gas mains, see DEPRECIATION, 9.
- Determination of accrued depreciation of natural gas well equipment, see DEPRECIATION, 10.
- Depreciation of natural gas property, see DEPRECIATION, 11-15.
- Natural gas rates, see RATES, 29.
- Treatment of gasoline revenues in fixing rates of natural gas company, see RETURN, 4.
- Right of owner of natural gas property to just compensation, see RETURN, 8.
- Return allowed for a natural gas company, see RETURN, 17, 18.
- Expenditures for labor and other expenses in drilling new gas wells as chargeable to gas well construction instead of to operating expenses, see RETURN, 34.
- Right of Commission to know amount for which property has been sold, see VALUATION, 1.
- Transmission rights-of-way and land of natural gas utility as not depreciated, see VALUATION, 18.
- Treatment of overheads in valuation, see VALUATION, 24-35.
- Charges for cost of labor, hauling freight, and similar items incurred in drilling of natural gas wells as not included in rate base when these items have been charged to operating expense, see VALUATION, 38.
- Treatment of cost of trenching and backfilling in natural gas property valuation, see VALUATION, 46.
- Valuation of natural gas leases and leaseholds, see VALUATION, 75-78.

NECESSITY.

See CERTIFICATES OF CONVENIENCE AND NECESSITY.

NEGLIGENCE.

General allegation of negligence in power transmission, see ELECTRICITY, 3.

NONPHYSICAL ELEMENTS.

Nonphysical elements affecting value, see VALUATION, 22-35.

NOTICE.

Consideration of notice to telephone company on review of order granting certificate to rival company, see APPEAL AND REVIEW, 4.

NUISANCE.

Interference with transmission of telegraph messages caused by induction of electrical forces from high voltage line as not a nuisance within Civil Code provisions, see ELECTRICITY, 1.

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OBSOLESCENCE.

Consideration of obsolescent property in valuation, see VALUATION, 14, 15.

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Violation of law with regard to directors of domestic telephone company, see INTERCORPORATE RELATIONS, 2.

Salaries of officials as an operating expense, see RETURN, 29.

Management fee and percentage of gross revenues payable to another company as not a proper operating expense of a natural gas company, see RETURN, 32.

OPERATING EXPENSES.

Commission power to scrutinize extravagant expenditures in rate case, see RETURN, 2.

Operating expenses and other deductions from gross revenues, see RETURN, 19-34.

Amounts which would properly be deducted from book investment of natural gas company for retirement as not deducted where investment should be amortized, see VALUATION, 37.

Charges for cost of labor, hauling freight, and similar items incurred in drilling of natural gas wells as not included in rate base when these items have been charged to operating expense, see VALUATION, 38.

OPERATION IN GOOD FAITH.

Operation in good faith prior to regulation, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 16-23.

OPINION.

Opinion evidence as to value of rights of way, see VALUATION, 79.

ORDERS.

Cross examination of witness upon exhibit not in evidence as correctly denied to railroad attacking Commission order in lower court, see EVIDENCE, 3.

Validity of Commission orders regarding proper installation of wiring when telephone company is engaged in interstate commerce, see INTERSTATE COMMERCE, 5-7.

ORDINANCES.

Franchise ordinances generally, see FRANCHISES.

Validity of duplicate unexclusive franchises, see CONSTITUTIONAL LAW, 9.

ORIGINAL COST.

Book cost or original investment as the basis for computing depreciation, see DEPRECIATION, 1.

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OVERCHARGES.

Deduction by consumer for overcharge which Board is not authorized to order refunded, see PAYMENT, 3.

Reparation for overcharges, see REPARATION.

OVERHEADS.

Application of depreciation to theoretical cost of the utility property including overheads, see DEPRECIATION, 2.

Treatment of, in valuation, see VALUATION, 24-35.

OWNERSHIP.

Ownership of meters, see SERVICE, 34.

PARENT COMPANIES.

See INTERCORPORATE RELATIONS.

PARTIES.

Qualifications of complainant as immaterial if practice of utility brought before Commission is one having public interest, see SERVICE, 1.

1. A complaint demanding sewage service should be dismissed as to a trust company charged as a co-defendant because of some questionable adverse interest which it has in the premises on which the system is located, on the ground that the question of ownership or title will not be entertained by the Commission where the premises used are in fact under full control of the utility. *Devon Park Hotel Corp. v. Hunter* (Pa.) 624.

2. A complaint demanding sewage service should be dismissed as to a corporation formed for the purpose of taking over a drainage system which was in fact never turned over to it in any manner or to any extent and to which no proceeds from the system have ever been paid. *Devon Park Hotel Corp. v. Hunter* (Pa.) 624.

PARTNERSHIP.

Restriction of joint trade name in the absence of partnership, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 25.

PASSENGERS.

Commission power to determine reasonable rates for passenger transportation on railroads, see RATES, 7.

PAVING.

Decision by Public Service Commission of sister state compelling street railway company upon discontinuance to leave surface of streets in condition similar to remainder of highway under statute in that state as not applying where there is no such statute, see COMMISSIONS, 6.

Cost of street paving as an operating expense of a railway system, see RETURN, 30.

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Duty of street railway to leave streets, avenues, and highways in good condition of repair upon withdrawal of property, see **SERVICE**, 25.

PAYMENT.

Refusal of water system to accept payment after taking such compensation for many years as not changing its status to that of a private company, see **PUBLIC UTILITIES**, 4.

Reserve for uncollectible accounts of natural gas company as not chargeable to operating expense when each consumer is required to make deposit, see **RETURN**, 31.

Factors considered in allowing for working capital, see **VALUATION**, 52-57.

1. Discontinuance of service to enforce payment of a gas bill disputed in evident good faith as excessive is not justified until the question of the consumer's indebtedness has been settled in a court of law. *Wood v. Public Service Electric & Gas Co.* (N. J.) 609.

2. An adjustment should be made in an unusually high bill covering a period when service was not received and resulting from the reading of a meter after its removal by house wreckers because of the failure of the utility company to read and remove it upon receiving notice that the building in which it was located would be torn down. *Dixie Candy Co. v. Atlantic City Electric Co.* (N. J.) 702.

3. The Board will not permit a discontinuance of service, if, in payment of future bills a consumer deducts an amount already paid under protest in excess of what the Board has approved as a reasonable charge, where it lacks authority to order a cash refund of the excess. *Dixie Candy Co. v. Atlantic City Electric Co.* (N. J.) 702.

4. A utility cannot place the financial liability of a previous owner or previous tenant upon any subsequent or prospective consumer not in some way identified with the earlier user and for that cause deny service, especially where the premises served have never been charged with any recorded lien arising out of the previous service. *Devon Park Hotel Corp. v. Hunter* (Pa.) 624.

5. Service by a drainage utility to a hotel property was ordered upon condition that present owners file a bond in appropriate form indemnifying the sewage operator against any loss from arrears to the extent of \$1,000 in view of the experience of the utility with former owners and operators of the same property. *Devon Park Hotel Corp. v. Hunter* (Pa.) 624.

6. A utility rule stating that all bills "will be rendered at face and are subject to a discount of 10 per cent if paid by the 15th of the month" was declared indefinite and a revision suggested to provide for all bills being rendered at face, to be due at the end of each quarter, subject to a discount of 10 per cent if paid on or within fifteen days after the due date. *Clearfield v. Clearfield Water Co.* (Pa.) 630.
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PENALTIES.

Penalty for illegal operation, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 26, 27.

PERMITS.

Licenses for diversion of state water power as not granted wholly for benefit of licensees but pursuant to policy of state favoring generation of low priced hydroelectric power, see **WATER POWERS**, 4.

PETITION.

Denial of certificate to operate motor utility when only evidence of necessity is petition signed by the inhabitants, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 15.

Requisites of petitions to give Commission jurisdiction over complaint against railroad service, see **SERVICE**, 2, 3.

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Qualification of pilots of aeroplanes, see **AVIATION**, 4.

PLEADINGS.

Sufficiency of citation to show cause why a penalty should not be levied for illegal operation, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 26.

Question whether a Commission has been given power by legislature to grant utility the right to cease operations altogether as not decided in proceeding where the utility has voluntarily invoked jurisdiction of Commission by filing petition for abandonment, see **COMMISSIONS**, 5.

General allegation of negligence in power transmission, see **ELECTRICITY**, 3.

Requisites of petitions to give Commission jurisdiction over complaint against railroad service, see **SERVICE**, 2, 3.

PLUMBERS.

Rules and regulations of water utility, see **SERVICE**, 46-52.

POLES.

Valuation of trolley pole and wire easements, see **VALUATION**, 62.

POLICE POWER.

See also **CONSTITUTIONAL LAW**, 10-16.

Courts as not to interfere with legislative authorization as to rates except in clear cases such as unreasonable exercise of police power, see **RATES**, 3.

POWER.

Reduction of electric rates because of improvident service contract for power from affiliated company, see **RATES**, 13.

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Treatment of application of power utility to issue additional securities because of alleged increase to value of land and water rights, see **SECURITY ISSUES**, 6.

POWERS.

Of Commissions generally, see **COMMISSIONS**, 2-14.

Of Commissions over consolidation, merger, and sale, see **CONSOLIDATION, MERGER, AND SALE**, 10.

Of legislature over rates, see **RATES**, 1, 2.

Of courts over rates, see **RATES**, 3.

Of Commissions over rates, see **RATES**, 4-10.

Of Commissions over reparation, see **REPARATION**, 1, 2.

Of Commissions over return, see **RETURN**, 2.

Of Commissions over security issues, see **SECURITY ISSUES**, 8-12.

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Reduction in estimated allowance for private road of water utility, see **VALUATION**, 42.

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Rules as to admissibility of evidence before Commission, see **EVIDENCE**, 2.

Evidence by city plant as to its procedure upon application for service as proper where it is being used for damages resulting from alleged failure to serve, see **EVIDENCE**, 7.

Adjustments in fares or charges for transfers as not considered in application for approval of merger of street railway systems, see **RATES**, 33.

Commission jurisdiction over abandonment of station agency with power to formulate rules of procedure for hearing of application, see **SERVICE**, 5.

1. Rules of pleading and practice and the technical rules of evidence
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that are to be observed by the trial courts, do not apply to hearings before the Public Utilities Commission (§ 4820, Chap. 5, Compiled Laws of Utah, 1917). *Logan City v. Utah Power & Light Co.* (Utah) 410.

PROMOTERS.

Promoter who, by reason of the failure of a proposed corporation to take over a sewerage system, is in control of the system and actively solicits business as operator of a public utility, see **PUBLIC UTILITIES**, 8.

PUBLIC RIGHTS.

Jurisdiction to safeguard public rights in regard to water powers, see **WATER POWERS**, 1-3.

PUBLIC UTILITIES.*I. In general, 1, 2.**II. What constitutes a public utility, 3-12.**I. In general.*

Proper party to be made defendant on complaint demanding sewage service, see **PARTIES**, 1, 2.

Summer resort company engaged in serving public as rendering public service and having duty to serve all patrons alike even though it is only a semi-public utility corporation, see **SERVICE**, 11.

Discussion of the evolution of regulation by the state of common carriage by automobiles, p. 444.

1. A water system operated for forty years by an industry, the rates for which, however, were not filed with the Commission until recent years, was held to be so impressed with public utility obligations and liabilities from the beginning of the dedication of its water to public use that its status since the establishment of the Commission could not be terminated without the authority of the latter. *Re Marin Lumber & Supply Co.* (Cal.) 661.

2. The Commission has jurisdiction to regulate service by a private utility over municipal mains notwithstanding a law (§ 10, Commerce Commission Act) exempting from its jurisdiction municipally owned plants, on the ground that the term "public utility" as used in the act applies to the operating organization rather than the physical property itself. *Dunlap v. Clarendon Hills Water Co.* (Ill.) 582.

II. What constitutes a public utility.

3. A water system originally installed for the purpose of supplying water to a sawmill was declared to be a public utility where for forty years the water had been dedicated to public use and sold for compensation to all applicants for service within the service area of the system. *Re Marin Lumber & Supply Co.* (Cal.) 661.

4. The refusal of a water system, operated by an industry, to accept P.U.R.1928B.

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payment for utility service after taking such compensation for forty years from consumers which it served, does not change its status to that of a private company nor relieve it of its obligation to render public service. *Re Marin Lumber & Supply Co. (Cal.)* 661.

5. The number of parties with which alleged private hauling contracts are made, considering the number of shippers and population of the particular community, determines in a great measure, the status of the carrier. *County Comrs. of Weld County v. Clayburg (Colo.)* 780.

6. A complaint against a private motor carrier was dismissed where he expressly stipulated that he did not hold himself out for public carriage and did not indiscriminately accept and transport freight or express, and designated specifically with whom he had an agreement, refusing to transport for any other. *County Comrs. of Weld County v. Clayburg (Colo.)* 780.

7. The advertisement of a motor freight carrier in a telephone directory and correspondence soliciting business are not absolute proof of the public utility status of the carrier as defined by the law (*Act No. 292, Louisiana Laws of 1926*) but they are strongly persuasive that the carrier holds itself out and actually does perform motor transportation service available to the public at large. *Public Service Commission v. Johnson Motor Freight Lines (La.)* 175.

8. A promoter who, by reason of the failure of a proposed corporation to take over a sewerage system, is in control of the system and actively solicits business, is the operator of a public utility within the meaning of § 1 of the Public Service Company Law. *Devon Park Hotel Corp. v. Hunter (Pa.)* 624.

9. Individuals who construct a sewage system for the purpose of developing land and have made a tappage charge, have constituted themselves a public service company as contemplated by § 1 of the Public Service Company Law, especially where most of the mains in the system are located under public highways. *Devon Park Hotel Corp. v. Hunter (Pa.)* 624.

10. One who undertakes for hire to transport from place to place the property of others who may choose to employ him is a common carrier within settled principles. *Washington ex rel. Stimson Lumber Co. v. Kuykendall (U. S. Sup. Ct.)* 258.

11. A tariff filed by an association of fifty owners of towboats was held to show that they held themselves out as common carriers, including the towing of logs, and for that purpose had devoted their towboats to the use of the public, and that they were common carriers not because of legislative fiat, but by reason of the character of the business carried on. *Washington ex rel. Stimson Lumber Co. v. Kuykendall (U. S. Sup. Ct.)* 258.

12. A common carrier is such by virtue of his occupation, not by virtue of the responsibilities under which he operates, and the limitations of liability peculiar to towboats not having exclusive control of their tows and notices that tows are at the owner's risk are immaterial. *Washington ex rel. Stimson Lumber Co. v. Kuykendall (U. S. Sup. Ct.)* 258.

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PUMPS.

Duty of utility to operate booster pump to supply reservoir, see *SERVICE*, 45.

QUOTATIONS.

Valuation of mains and pipes of natural gas company at actual cost as preferred over theoretical prices based on general quotations where public utility through affiliations is enabled to secure material advantageously, see *VALUATION*, 45.

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Suggestion in brief filed for industry appealing judgment dismissing suit against railroad for expense of side track maintenance that carrier is liable for repair expense under orders of Director General of Railroads as not properly before court, see *APPEAL AND REVIEW*, 5.

Extent of Commission jurisdiction of managerial questions of service, see *COMMISSIONS*, 11.

Fixing of rates below point of confiscation as unconstitutional, see *CONSTITUTIONAL LAW*, 4, 5.

Cross examination of witness upon exhibit not in evidence as correctly denied to railroad attacking Commission order in lower court, see *EVIDENCE*, 3.

Refusal to enjoin operation of motor bus utility unauthorized by Commission or other governmental authority in suit filed by competing railroad unless irreparable loss is shown, see *INJUNCTION*, 2, 3.

Exercise of local police powers with respect to interstate railroads, see *INTERSTATE COMMERCE*, 3, 4.

Commission power to determine reasonable rates for passenger transportation on railroads, see *RATES*, 7.

Presumption as to reasonableness of rates fixed by Railroad Commission, see *RATES*, 17.

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Economies resulting from electrification of interurban railroad previously a steam railroad, see *SECURITY ISSUES*, 4.

Requisites of petitions to give Commission jurisdiction over complaint against railroad service, see *SERVICE*, 2, 3.

Jurisdiction of Commission over station agency, see *SERVICE*, 4.

Railroad service, see *SERVICE*, 40.

RATES.

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II. Powers of courts, 3.

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IV. Reasonableness, 11-20.

a. Factors considered in determining reasonableness, 11-16.

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- c. Gas, 26, 27.*
- d. Municipal plant, 28.*
- e. Natural gas, 29.*
- f. Railroad, 30, 31.*
- g. Street railway, 32, 33.*
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VII. Test period, 38.

Commission as not limited in its prerogative to regulate rates by admission of any witness, see COMMISSIONS, 1.

Fixing of inadequate rates as unconstitutional, see CONSTITUTIONAL LAW, 4, 5.

State rate regulation as not depriving lumber operator of property rights in violation of 14th Amendment of Constitution, see CONSTITUTIONAL LAW, 8.

Police power with respect to city contracting away its rights as to rates, see CONSTITUTIONAL LAW, 10-14.

Discrimination in rates, see DISCRIMINATION.

Water system which has operated without filing rates with Commission until recent years as impressed with public utility obligations which cannot be discontinued without Commission consent, see PUBLIC UTILITIES, 1.

Tariff filed by association of owners of towboats as indicating status of common carriers, see PUBLIC UTILITIES, 11.

Return produced by rates generally, see RETURN.

Necessity of valuation, even though company is willing to forego return so as to fix rates on theory that various items of expense should be allocated to respective classes of customers in view of expenses varying with size and value of property, see RETURN, 9.

Expense of rate litigation, see RETURN, 20-24.

Adequate service as a corollary to fair rate of return, see SERVICE, 13.

Measures of value for rate making, see VALUATION, 1-4.

I. Powers of legislature.

1. Rates fixed by a contract authorized by the legislature for an unlimited or an unreasonable duration are in violation of the police power of the state. *New Haven Water Co. v. New Haven* (Conn. Sup. Ct. Err.) 475.

2. Street railway franchises, whether granted by municipal option prior to the enactment of Article 3, § 18 of the State Constitution, or directly by legislative action, are subject to legislative regulation as to rates. *Evens v. Public Service Commission* (N. Y. Ct. App.) 247.

II. Powers of courts.

3. Courts will not interfere with the legislative authorization as to rates except in clear cases such as the unreasonable exercise of police power *P.U.R.* 1928B.

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in fixing rates for an unlimited time. *New Haven Water Co. v. New Haven* (Conn. Sup. Ct. Err.) 475.

III. Jurisdiction, powers, and duties of Commissions.

4. The Railroad Commission has no jurisdiction to entertain a petition for the regulation of rates over a toll bridge which is not proven to have been taken over as a part of the state highway system where the law (Acts 1919, p. 411, amended by Acts 1921, p. 177) conferring jurisdiction on the Commission makes no mention of such situation. *Railroad Commission v. Bovay* (Ark. Sup. Ct.) 237.

5. The parties to a contract for rates of unreasonable or indefinite term as to either or both parties may, if they are unable to agree as to a reasonable duration, apply to the Public Utilities Commission, which has power under an act (Public Utilities Act 1921, Chap. 328) to determine a reasonable term and to fix rates if they also are unreasonable for such a term. *New Haven Water Co. v. New Haven* (Conn. Sup. Ct. Err.) 475.

6. Rates fixed by a contract between a city and a water company are not unalterable but continually subject to the exercise of the police power of the state when their duration is an unreasonable one. *New Haven Water Co. v. New Haven* (Conn. Sup. Ct. Err.) 475.

7. Under the act creating the Railroad Commission of Georgia (Acts 1878-79, p. 125; Civil Code 1910, §§ 2630, 2631), now the Georgia Public Service Commission (Acts 1922, p. 143; Park's Code Supp. 1926; and Michie's Georgia Code 1926, § 2670 [a] et seq.), the Commission has the power to determine what are just and reasonable rates and charges for transportation of passengers on each of the railroads doing business in this state. *Georgia Pub. Service Commission v. Atlanta & West Point R. Co.* (Ga. Sup. Ct.) 136.

8. The Commission has no jurisdiction over freight and express rates of motor carriers. *Re Pickwick Stages System* (Mo.) 1.

9. A consent by a city to the extension of lines by its traction system management pursuant to certain laws (Chap. 565, Laws 1890, amending Laws 1892, Chap. 676) specifically reserving to the legislature the right to regulate the fares of any railroad constructed and operated under its provision is a waiver by the city of any right which it may have had to fare restriction prior to that time in original charters of the railway company. *Evens v. Public Service Commission* (N. Y. Ct. App.) 247.

10. The Commission is enjoined to establish just and reasonable rates for a public utility in all cases where the reasonableness of the same are brought into question and are shown to be otherwise, under a law (§ 4800, Compiled Laws of Utah, 1917) directing the Commission, upon finding that rates charged or collected by any utility for any service to be insufficient, to determine sufficient rates, and charges therefor. *Logan City v. Utah Power & Light Co.* (Utah) 410.

IV. Reasonableness.

a. Factors considered in determining reasonableness.

11. A comparison of rates has little, if any, value when no evidence is P.U.R.1928B.

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submitted to show that the rates used in a measure are themselves just and reasonable. *Sperry Flour Co. v. Island Transp. Co.* (Cal.) 563.

12. It is immaterial whether the Commission or court on appeal make a determination of rates under provisions of a contract with a city which requires that they be "fair and reasonable" or under the terms of the Public Utility Act (1921, Chap. 328) which provides that they be "just, reasonable, and adequate for public convenience, necessity and welfare," since the result of the use of either would amount to the same thing. *New Haven Water Co. v. New Haven* (Conn. Sup. Ct. Err.) 475.

13. Rates of an electric utility were reduced 1 cent per kilowatt hour where the company had been supplied current by a power and building company having the same officials as the utility under a contract allowing the private company a profit apparently at the utility's expense. *Re Amesbury* (Mass.) 591.

14. An increase of rates was granted to a telephone utility where the reconstruction of the system from grounded to metallic lines was made necessary by field conditions and resulting poor service, the subscribers having by signed petition approved of such readjustment. *Re Lincoln Teleph. & Teleg. Co.* (Neb.) 533.

15. Rates of fare should not be established to produce theoretical returns when their practical application is likely to restrict traffic so greatly as to defeat their own purpose. *Re Duluth Street R. Co.* (Wis.) 228.

16. Rates which have been established and actually applied to traffic by various operators prior to regulation by the Commission are prima facie reasonable, but this presumption should not prevail even in the absence of other testimony where the rates are manifestly unreasonable. *Re Auto Transp. Co.* (Wis.) 439.

b. Burden of proof and presumptions.

17. Maximum intrastate passenger rates were fixed by the Railroad Commission of Georgia, effective since September 1, 1920, at 3.6 cents per mile on railroads doing business in this state. This rate is prima facie reasonable and just. *Georgia Pub. Service Commission v. Atlanta & West Point R. Co.* (Ga. Sup. Ct.) 136.

18. Protestant against a "room rate" demand charge for electric service did not sustain the burden of proof to support his contention that rates were misleading, inequitable, and discriminatory where only 24 consumers had higher bills as against about 4,000 benefited by the change. *Sullivan v. Rockland Electric Co.* (N. J.) 201.

19. In a proceeding brought to abrogate such legal rates, and to substitute therefor special rates in favor of some particular person, corporation, or locality, the burden rests upon the complainant to establish that such uniform rates are unjust and unreasonable. *Tulsa Tribune Co. v. Oklahoma Nat. Gas Co.* (Okla. Sup. Ct.) 376.

20. The burden of proof to sustain the reasonableness of increased rates was held to be upon the utility. *Pottsville v. Pottsville Water Co.* (Pa.) 613.

RATES—*continued*.**V. Kinds.**

21. Admitting the legality of the service charge, the Commission advised a consideration of the reduction of the charge, in view of considerable dissatisfaction among consumers who did not understand the justice of such basis of rates. *Knoxville v. South Pittsburgh Water Co. (Pa.)* 204.

22. Failure to provide metered service to domestic consumers is not unreasonable where the tariff of the utility discloses no discrimination to consumers upon the flat rate basis and the saving of water from such charge would not offset the additional investment and expense of such service. *Pottsville v. Pottsville Water Co. (Pa.)* 613.

23. A charge for reinstalling water meters, in the absence of an explanation and justification thereof, will not be permitted, especially in view of the general proposition that such charges are a general operating expense. *Clearfield v. Clearfield Water Co. (Pa.)* 630.

VI. Rates of particular utilities.**a. Boat.**

24. A wharf or landing place which appears to be out-of-line in the normal navigation course between two major points, can not be given the status of an intermediate point as contemplated by a law (§ 24 (a) Public Utilities Act) providing for special rates to such points, in the absence of specific proof of its right to such status. *Sperry Flour Co. v. Island Transp. Co. (Cal.)* 563.

b. Electric.

Reduction of electric rates because of improvident service contract for power from affiliated company, see *supra*, 13.

Burden of proof to support contention that rates are misleading, inequitable, and discriminatory as not sustained, see *supra*, 18.

25. The "room rate" demand charge may be sustained as an endeavor to measure the demand element in the cost of operation by some simple and easily understood rule and to distribute the cost of extra equipment used during peak demand equitably among such consumers as make the most use of such equipment. *Sullivan v. Rockland Electric Co. (N. J.)* 201.

c. Gas.

An analysis of the elements to be considered in the composition of a scientific rate structure equitably distributing the cost of operation and at the same time tending to produce greater volume of business, p. 759.

26. A rate structure theory claiming to give consideration to the rates charged the large consumers in order to increase sales and then proceeding to justify the proposed increase to 57 per cent of the small consumers by the use of an allocation of costs made upon the theory that all consumers may be taken as one class, the smaller class, is inconsistent. *Re St. Joseph Gas Co. (Mo.)* 755.

27. To allocate the costs incurred by a gas system serving varied classes *P.U.R.* 1928B.

RATES—continued.

of consumers as though the consumers were all of one class, the smaller class, is liable to produce unfair rates to the smaller consumers. *Re St. Joseph Gas Co. (Mo.)* 755.

d. Municipal plant.

Commission duty to regulate practices, rates, and charges of municipally owned utilities, see *MUNICIPAL PLANTS*, 2.

28. As long as taxpayers are required to continue to pay taxes to a city to maintain and operate the city's electrical plant in order that its patrons may be served with electrical energy below cost the rates of such a plant remain unjust, unreasonable, and in violation of the law. *Logan City v. Utah Power & Light Co. (Utah)* 410.

e. Natural gas.

29. A schedule of "step-up" rates prescribed in order to conserve the gas supply and discourage the larger use of the fuel is not satisfactory where it is not possible for the company to conserve the gas underlying the property controlled by it, and its failure to purchase more gas will not prolong the life of the territory from which its purchased gas is produced, but in order to provide a greater volume of business for its future success a "step-down" rate should be made. *Re Cumberland & A. Gas Co. (W. Va.)* 20.

f. Railroad.

Presumption as to reasonableness of rates fixed by Railroad Commission, see *supra*, 17.

30. Where a railroad corporation voluntarily establishes commutation rates, less than the intrastate mileage rates fixed by the State Commission, between a large city at one terminus of its line and a suburban town near such city, the establishment of such commutation rates on account of local conditions cannot be held to be the establishment of a "general policy" to put in commutation rates between all the towns on the line of such railroad where conditions are different. *Georgia Pub. Service Commission v. Atlanta & West Point R. Co. (Ga. Sup. Ct.)* 136.

31. Where a rate has been fixed by the Corporation Commission for services designated by the Commission as a switching service at 2 cents per 100 pounds on sand, gravel, and crushed stone, and said rate is found to be adequate and reasonable, held, that it was not error for the Corporation Commission to order that broken stone should take the same rate as crushed stone, sand, and gravel. *St. Louis-S. F. R. Co. v. State (Okla. Sup. Ct.)* 557.

g. Street railway.

Rates of fare as not to be established to produce theoretical returns when their practical application is likely to restrict traffic so as to defeat purpose, see *supra*, 15.

Approval of merger of two street railway companies where uniting of systems with resulting transfer privileges will be for great convenience of large number of people, see *CONSOLIDATION, MERGER, AND SALE*, 9.

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RATES—*continued.*

32. A complaint against an alleged discriminatory zoning system of a street railway was dismissed where no evidence of a more practical or fair solution of the operating and traffic condition was shown, giving consideration to the elements of topography, density of population, public accommodation, and other factors which make it impossible to preserve exact uniformity of zone lengths, and where no abuse of managerial discretion was shown. *Sugar Notch v. Wilkes-Barre R. Corp.* (Pa.) 619.

33. Adjustments in fares or charges for transfers will not be considered in an application for approval of a merger of two street railway systems for transfer convenience where the application does not refer to any change or modification in such fares or transfers; and such matters can be considered only upon proper application. *Re Milwaukee Electric R. & Light Co.* (Wis.) 345.

h. Telephone.

Authorization of increase in telephone rates where reconstruction of system from grounded to metallic lines is necessary and consented to by subscribers, see *supra*, 14.

34. The particular requirements of the territory under consideration, the effect a change in method of charging for telephone service may have, and the particular local service conditions must all be studied in a proceeding to inaugurate toll rates and, if the reasonable interests of the large majority of the subscribers require such rates, then the personal interests of the few should give way to such requirement. *Re Pomona Valley Teleph. & Teleg. Union* (Cal.) 705.

35. Factors to be considered in changing from flat to toll rates are the extent of territory served, the extent of community interest, the amount of intracommunity telephone traffic as compared with other traffic, comparison of cost of the service under both plans to the majority and to the minority, and the consideration of operating conditions under both plans. *Re Pomona Valley Teleph. & Teleg. Union* (Cal.) 705.

36. The adoption of toll rates for service where the cost of operation in carrying charges in connection with each such toll message would be materially increased over that which would obtain for a flat rate with untimed calls, is not justified unless other conditions outweigh and require such toll rates. *Re Pomona Valley Teleph. & Teleg. Union* (Cal.) 705.

37. Rates will not be authorized effective immediately for common battery service to be furnished at some indefinite future date. *Re Cozad Mut. Teleph. Co.* (Neb.) 695.

VII. Test period.

Failure to provide metered service to domestic consumers as not unreasonable where tariff discloses no discrimination and saving of water from such charge would not offset additional investment and expense, see *supra*, 22.

Charge for reinstalling water meters in absence of explanation as not permitted, see *supra*, 23.

Absence of presumption that statutory requirement that municipalities P.U.R.1928B.

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guarantee dividends to water utility was meant as consideration for free fire service, see RETURN, 1.

Agreement between residents of elevated section outside of city limits, but within metropolitan area, and water utility consenting to higher rates for service in consideration of additional equipment, see SERVICE, 17.

Charges for turning on and off water, see SERVICE, 46.

38. A private utility whose previous flat rates were shown to be discriminatory and wasteful and a competing city plant whose proposed meter rates were insufficient to pay operating cost, thereby burdening taxpayers, were both ordered to charge equal meter rates for a test period of one year in view of the fact that competitive conditions and uncertain consumption did not warrant a permanent finding of reasonable rates for either utility at that time and a subsequent order could permit a reduction by either plant upon a showing that its revenues permitted the same. *Logan City v. Utah Power & Light Co. (Utah)* 410.

REAL ESTATE.

Consideration of real estate in transit reorganization plan, see CONSOLIDATION, MERGER, AND SALE, 11-14.

REASONABLENESS.

Of rates, see RATES, 11-20.

Of return, see RETURN, 5-18.

RECAPTURE PROVISION.

Jurisdiction of Commission to consider recapture provision of city traction contract, see SECURITY ISSUES, 9.

RECEIVERS.

Upset price of street railway property fixed by court in receiver's sale as of little importance in determining amount of securities to be issued by new company, see SECURITY ISSUES, 2.

Provisions relating to mortgage bonds and other securities of company purchasing street railway at receiver's sale, see SECURITY ISSUES, 3.

Sale price at receiver's sale as not necessarily indicative of value of property, see VALUATION, 12.

REFUND.

Deduction by consumer for overcharge which Board is not authorized to order refunded, see PAYMENT, 3.

RELIABILITY.

Of commercial aviation, see AVIATION, 2.

REORGANIZATION.

Metropolitan transit reorganization, see CONSOLIDATION, MERGER, AND SALE, 11-14.

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REORGANIZATION COMMITTEE.

Provisions relating to mortgage bonds and other securities of company purchasing street railway at receiver's sale, see **SECURITY ISSUES**, 3.

REPAIRS.

Expense of spur track maintenance, see **SERVICE**, 40.

REPARATION.

Deduction by consumer for overcharge which Board is not authorized to order refunded, see **PAYMENT**, 3.

1. The Commission has no authority to require a natural gas company to remit to its consumers the difference between rates fixed by a Commission order and the rates in effect. Re *Cumberland & A. Gas Co. (W. Va.)* 20.

2. The power and authority of the Commission under its rule (No. 68) with respect to refunding overcharges on freight movements within the state adopted pursuant to the provision of the state Constitution (1921) is superior to that of a law (Act 223 of 1914) fixing a prescriptive period of two years as a bar to the recovery of overcharges. *Howard Kenyon Dredging Co. v. Louisiana R. & Nav. Co. (La.)* 511.

3. A consumer is estopped to recover excess water rates or any additional damages which it might otherwise lawfully claim, where the money was paid to the city without questioning the right of the latter to collect it, and where it permitted the city to expend the money for the benefit of all consumers, including itself. *Pabst Corp. v. Milwaukee (Wis. Sup. Ct.)* 503.

REPLEVIN.

Seizure and sale of motor bus equipment by sheriff and resumption of service by the purchasers under authority of Commission as causing break in continuity of service originating prior to regulation, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 22.

REPORTS.

Misleading reports governing temporary disconnection of telephones, see **SERVICE**, 41.

REPRODUCTION COST.

Profit on valuation not in excess of reproduction price as not unfair burden upon public, see **RETURN**, 5.

Check on reproduction cost by index figures, see **VALUATION**, 2.

Use of reproduction cost estimates as not sole method of proving present value, see **VALUATION**, 3.

RESERVES.

Consumers' credit for excessive accumulation of depreciation reserve, see **DEPRECIATION**, 17.

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RESERVOIRS.

Duty of utility to operate booster pump to supply reservoir, see *SERVICE*, 45.

RESTRICTIONS.

Seasonal restrictions for extension of water service, see *SERVICE*, 14.

RETIREMENTS.

Amounts which would properly be deducted from book investment of natural gas company for retirement as not deducted where investment should be amortized, see *VALUATION*, 37.

RETURN.

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b. Expense of rate litigation, 20-24.

c. Payments to related companies, 25, 26.

d. Taxes, 27, 28.

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Rates of fare as not to be established to produce theoretical returns when their practical application is likely to restrict traffic so as to defeat purpose, see *RATES*, 15.

Capitalization as bearing relation to earnings as well as cost or value of property, see *SECURITY ISSUES*, 1.

Unauthorized discontinuance of service for inadequate revenue, see *SERVICE*, 26.

Grounds for authorizing discontinuance of service, see *SERVICE*, 27-33.

I. In general.

1. In the absence of an express statutory stipulation, there is no presumption that a provision of a statute (P. L. 79 of 1854) requiring municipalities to guarantee dividends to a water utility was meant to be a consideration for free fire service by the utility to the municipalities. *Pottsville v. Pottsville Water Co. (Pa.)* 613.

II. Powers of Commissions.

2. The Commission although not the manager of public utilities has the power to scrutinize carefully extravagant expenditures in a rate case. *Re Cumberland & A. Gas Co. (W. Va.)* 20.
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RETURN—*continued.***III. Basis.**

3. The present fair value rather than the amount of money invested in utility property is the basis on which to calculate rates. *Re Clarksburg Light & Heat Co. (W. Va.)* 290.

IV. Gross revenues.

4. Income from the sale of gasoline by a natural gas company should be included in the gross revenue for the purpose of fixing rates when the company has expended large amounts for rerubbing its line which rerubbing was made necessary because of the fact that the gasoline was extracted from the gas, particularly where it appears that before the line was rerubbed millions of feet of gas were lost by reason of the shrinkage of the rubber gaskets; that the gas is still escaping by reason of the fact that the gasoline has been extracted from the gas; and that the removal of the gasoline reduces the heat units in the gas. *Re Cumberland & A. Gas Co. (W. Va.)* 20.

V. Reasonableness.**a. In general.**

5. To permit a company purchasing a street railway at a receiver's sale to make a profit, if it is able, upon a valuation not in excess of the reproduction price of the property, which is less than the original investment, is not an unfair burden upon the public, especially where an opportunity will thereby be afforded to bondholders of the defunct operating company to recover the value of their investment. *Re Boston, W. & N. Y. Street R. Co. (Mass.)* 516.

6. Economy of operation where coupled with efficiency of operation should not be penalized but might well be recognized in giving consideration to proper annual dividends. *Re Cozad Mut. Teleph. Co. (Neb.)* 695.

7. Complaint against a rate structure as a whole will be dismissed where the net income produced by the tariff under attack will not be in excess of that produced by any reasonable rate of return upon such fair value as the Commission might justly find under facts of record. *Pottsville v. Pottsville Water Co. (Pa.)* 613.

8. The owner of natural gas property which the public is entitled to use is entitled to just compensation from the public by way of rates for such use. *Re Clarksburg Light & Heat Co. (W. Va.)* 290.

b. Necessity of valuation to determine reasonableness.

9. Valuation of utility property is necessary even when a company offers to forego its return so as to fix rates on the theory that various items of expense should be allocated to the respective classes of customers, taking into account their demands, since such expenses as depreciation, retirement, taxes, and maintenance vary with the size and value of the property. *Re St. Joseph Gas Co. (Mo.)* 755.

10. In determining what is a fair and reasonable rate, it is essential that the Corporation Commission determine the value of the property of P.C.R.1928E.

RETURN—continued.

the public utility used and useful in serving the people. *Tu'sa Tribune Co. v. Oklahoma Nat. Gas Co.* (Okla. Sup. Ct.) 376.

11. The value of the property of a public utility used in its public service business must be ascertained to determine whether the return is fair. *Re Clarksburg Light & Heat Co.* (W. Va.) 290.

c. Specific amounts allowed.

12. A telephone company earning approximately a 5 per cent return on a reasonable rate base was held to be entitled to an increase in rates and charges that would provide for a greater profit. *Re Pomona Valley Teleph. & Teleg. Union* (Cal.) 705.

13. An increase in rates to yield a return of 6.27 per cent was allowed to a telephone utility. *Re Clinton County Teleph. Co.* (Mo.) 796.

14. An increase of rates was allowed a water utility sufficient to yield a return of 7 per cent. *Knoxville v. South Pittsburgh Water Co.* (Pa.) 204.

15. An increase of telephone rates was allowed to produce a return of 7 per cent. *Erie v. Mutual Teleph. Co.* (Pa.) 536.

16. A return of 7 per cent was allowed on the present fair value of a water utility. *Clearfield v. Clearfield Water Co.* (Pa.) 630.

17. A natural gas company is entitled to rates that will enable it to undertake to earn a return of 8 per cent. *Re Cumberland & A. Gas Co.* (W. Va.) 20.

18. Natural gas rates calculated to produce a net return of 7.928 per cent upon the fair value of the property were approved, where with a possible improvement in industrial consumption a return of more than 9 per cent might be earned. *Re Clarksburg Light & Heat Co.* (W. Va.) 290.

VI. Operating expenses and other deductions from gross revenues.**a. In general.**

Factors considered in allowing for working capital, see **VALUATION**, 52-57.

19. An increase in operating expenses following a consolidation was allowed on the theory that a telephone company operating without competition was required to render a higher and more expensive standard of service than formerly. *Erie v. Mutual Teleph. Co.* (Pa.) 536.

b. Expense of rate litigation.

Commission power to scrutinize extravagant expenditures in rate case, see *supra*, 2.

20. The expense of a rate proceeding of a telephone company was amortized over a period of five years in an annual fractional charge to operating expense in view of the excessive expense of a rate proceeding as compared with total operating expenses and with the size of the property as well as the relative rarity of the valuation estimate. *Re Clinton County Teleph. Co.* (Mo.) 796.

21. No allowance was made for the expense of a rate proceeding to a water utility where the services of a parent company in connection with the cost had been without charge and no testimony had been offered in **P.U.R.1928B**.

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support of the amount claimed, where additional revenues by way of rate increases prior to the proceedings had been sufficient to defray the expense. *Knoxville v. South Pittsburgh Water Co. (Pa.)* 204.

22. Costs incident to a rate proceeding which have been met from current revenue need not be amortized. *Shamokin v. Roaring Creek Water Co. (Pa.)* 385.

23. An excessive charge of the cost of a rate case should not be allowed as an operating expense especially when it may be that certain of the expense was incurred for reasons other than presenting the case to the Commission. *Re Cumberland & A. Gas Co. (W. Va.)* 20.

24. The expense of conducting a rate case before the Commission was considered a legitimate charge against operating expenses and was amortized over a period of five years. *Re Clarksburg Light & Heat Co. (W. Va.)* 220.

c. Payments to related companies.

See also *infra*, 32.

Reduction of rates because of improvident contract with affiliated company, see **RATES**, 13.

25. An increase in the administration charge by a parent company from 84 cents per consumer to 3 per cent of gross revenue resulting in an annual increase of \$8,000 in the operating expenses of a water utility for the alleged purpose of dividing the charge among the controlled companies more equitably, was held not to yield sufficient advantages to the local company to warrant the additional payment and the amount was disallowed. *Knoxville v. South Pittsburgh Water Co. (Pa.)* 204.

26. In determining normal operating expenses a further reduction was made to represent a year's deficit of a bus line which a street railway company had agreed to reimburse. *Re Duluth Street R. Co. (Wis.)* 228.

d. Taxes.

27. The amount of taxes claimed by a water utility, including state capital stock tax and Federal taxes, was lowered by the Commission's estimate, in view of the fact that such amount depended to some extent upon the income of the company. *Knoxville v. South Pittsburgh Water Co. (Pa.)* 204.

28. Benefits derived by a utility from continuing under its own charter independent of subsequent constitutions accrue to its stockholders as distinguished from its consumers and any consequent tax burdens caused thereby should be borne by the former. *Pottsville v. Pottsville Water Co. (Pa.)* 613.

e. Miscellaneous charges.

Lack of Commission jurisdiction over questions of employees' wages, see **COMMISSIONS**, 13.

Allowances for depreciation, see **DEPRECIATION**.

Charges for cost of labor, hauling freight, and similar items incurred in drilling of natural gas wells as not included in rate base when these items have been charged to operating expense, see **VALUATION**, 38.

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RETURN—continued.

29. The officers of a home managed telephone company should be paid a reasonable compensation for the services which they render. *Re Cozad Mut. Teleph. Co. (Neb.) 695.*

30. The cost of paving streets in compliance with statute (§ 178. Railroad Law) is just as legitimate an operating expense as the items of salaries and wages of officers and employees of a railroad system. *Re Second Avenue R. Co. (N. Y. T. C.) 820.*

31. A reserve for uncollectible accounts of a natural gas company should not be charged to operating expense when each consumer is required to make a deposit before receiving gas. *Re Cumberland & A. Gas Co. (W. Va.) 20.*

32. A management fee and percentage of gross revenues payable to another company were disallowed as an operating expense of a natural gas company where general office salaries had been increased as well as the salaries of other employees as the management fee had been disallowed by the Commission in former cases involving the property. *Re Cumberland & A. Gas Co. (W. Va.) 20.*

33. Donation should not be charged as an operating expense of a natural gas company. *Re Cumberland & A. Gas Co. (W. Va.) 20.*

34. Expenditures for labor and expenses in drilling new gas wells should be charged to gas well construction account instead of to operating expenses. *Re Clarksburg Light & Heat Co. (W. Va.) 290.*

REVENUES.

Factors considered in allowing for working capital, see **VALUATION**, 52-57.

RIGHT OF WAY.

Percentage allowance for depreciation of items of natural gas property, see **DEPRECIATION**, 11-15.

Transmission rights-of-way and land of natural gas utility as not depreciated, see **VALUATION**, 18.

Valuation of traction easements, as affected by highways crossing private rights of way, see **VALUATION**, 63.

Valuation of, see **VALUATION**, 79.

ROADBED.

Right of Commission to permit withdrawal of street railway company property from use of public as accompanied by authority to fix reasonable terms, see **SERVICE**, 8.

ROOM RATES.

Burden of proof to support contention that rates are misleading, inequitable, and discriminatory as not sustained, see **RATES**, 18.

Approval of room rate demand charge, see **RATES**, 25.

RULES AND REGULATIONS.

Adoption of general rules and regulations governing aircraft, see **AVIATION**, 1.

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RULES AND REGULATIONS—continued.

- Rules as to admissibility of evidence before Commission, see EVIDENCE, 2.
- Admissibility of city utility rules in damage suit by consumer for failure to serve, see EVIDENCE, 8.
- Rules of pleading and practice and technical rules of evidence observable by trial courts as not applying to hearings before Commission, see PROCEDURE, 1.
- Commission jurisdiction over abandonment of station agency with power to formulate rules of procedure for hearing of application, see SERVICE, 5.
- Summer resort company engaged in serving cottages with light and water as not to discontinue service because of failure of consumers to install septic tank, see SERVICE, 30.
- Rules and regulations of water utility, see SERVICE, 46-52.
- Suspension of rule requiring utilities to own and maintain meters and incidental connections with express restriction that such equipment is not to be used in determining rate base, see VALUATION, 41.

SAFETY.

- Of commercial aviation, see AVIATION, 2.

SALARIES AND WAGES.

- Lack of Commission jurisdiction over questions of employees' wages, see COMMISSIONS, 13.
- Salaries of officials as an operating expense, see RETURN, 29.

SALE.

- See CONSOLIDATION, MERGER, AND SALE.

SALE PRICE.

- Duty of Commission to consider sale price in authorizing security issues, see SECURITY ISSUES, 8.
- Sale price and interest rate of security issues, see SECURITY ISSUES, 15-18.
- Right of Commission to know amount for which property has been sold, see VALUATION, 1.

SAND.

- Railroad switching rates on sand, gravel and crushed stone, see RATES, 31.

SCHEDULES.

- Schedule of step-up rates prescribed in order to conserve natural gas supply as not satisfactory where it is not possible for company to conserve gas underlying property, see RATES, 29.

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SEASONAL RESTRICTIONS.

Seasonal restrictions for extension of water service, see *SERVICE*, 14.

SECURITY ISSUES.*I. In general, 1-7.**II. Jurisdiction, powers, and duties of Commissions, 8-12.**III. Purpose, 13, 14.**IV. Sale price and interest rate, 15-18.**I. In general.*

Evidence as to ownership of stock in telephone utility as material to consideration of petition for authority to purchase such stock by two other telephone companies, see *CONSOLIDATION, MERGER, AND SALE*, 3.

Evasion of statutory provisions relating to stock purchases and qualification of directors as affecting consolidation of telephone exchanges, see *CONSOLIDATION, MERGER, AND SALE*, 5.

Absence of necessity for determining value for issuing securities in proceeding to secure approval of consolidation, see *CONSOLIDATION, MERGER, AND SALE*, 6.

Lack of Commission jurisdiction to prevent sale of stock to individual in interest of nonresident holding company, see *CONSOLIDATION, MERGER, AND SALE*, 10.

Evasion of laws regulating stock buying in competitors by holding companies, see *INTERCORPORATE RELATIONS*, 1, 2.

Application of reproduction cost theory to land appraisal by comparative appraisals with addition of broker's commission and adequate amount for other transfer costs, see *VALUATION*, 6.

Reproduction cost less depreciation as a consideration in determining whether amount of capitalization for which authorization is sought bears a relation to fair value, see *VALUATION*, 10.

Ascertainment of value for purpose of security issues, see *VALUATION*, 10.

Brokerage as an item in valuation, see *VALUATION*, 23.

Discussion of the policy of investing earnings in property instead of declaring dividends, p. 698.

1. The capitalization of properties should bear some relation to their earnings as well as the cost or the value thereof and a form of capitalization which, on its face, seems to preclude the raising of some of the construction funds through the issue of common stock is not in the public interest and should not be authorized. *Re Los Angeles County Water Works (Cal.)* 570.

2. The upset price of street railway property fixed by the court in a receiver's sale is of little importance in determining the amount of stocks and bonds which may be properly issued in capitalizing a new company which is organized for the purpose of operating the property. *Re Boston, W. & N. Y. Street R. Co. (Mass.)* 516.

3. Mortgage bonds and the securities incident thereto of a company purchasing a street railway at a receiver's sale were all ordered to be deposited and made available to the receiver in accordance with the foreclosure P.U.R.1928B.

SECURITY ISSUES—*continued.*

decree of the supreme judicial court, and the rights of a reorganization committee with an underwriting syndicate were ordered to be acquired by the purchasing company, as conditions precedent to the issuance of stocks and bonds of the company. *Re Boston, W. & N. Y. Street R. Co. (Mass.)* 516.

4. An issuance of bonds to provide for the electrification of an inter-urban railroad previously steam operated was approved as consistent with public interest where the savings in operating expenses and labor alone were shown to be more than sufficient to cover interest charges on the additional capital necessary for the electrification and where the Department was satisfied that the change would not increase or postpone a reduction of fares but instead would result in improved service and maintenance economies. *Re Boston, R. B. & Lynn R. Co. (Mass.)* 596.

5. A chattel mortgage upon certain motor busses was allowed in favor of a power utility which had paid the purchase price of such busses in order to release them from a conditional sales contract to permit the sale of the property by the motor bus company to another corporation. *Re Coast Cities R. Co. (N. J.)* 545.

6. An application of a power utility to issue additional securities by reason of an alleged greater value of its land and water rights was denied where the average normal flow of a stream, exclusive of surplus canal waters, was insufficient for the operation of the applicant's plant at full capacity and would not of itself justify any increase in such values over a previous allowance and where a fair construction of the State Conservation Law (Art. 10-a) did not permit the capitalization of licenses authorizing the diversion of surplus canal waters. *Re Lockport & N. Power & Water Supply Co. (N. Y.)* 183.

7. A discount incurred in the sale of collateral trust bonds may properly form a basis for the issue of capital securities where evidence establishes that the discount transaction was prudent and resulted to the advantage of the company under the market conditions at the time of the issue. *Re United Electric Power Co. (R. I.)* 641.

II. Jurisdiction, powers, and duties of Commissions.

8. Stock cannot be authorized to be issued in the future to retire bonds where the Department cannot determine whether the amount of shares applied for would be necessary or whether the future market price would not be so low as to be inconsistent with public interest in view of a statute compelling the decision of the Department as to such issues to be based on the consistency of the sale price with public interest. *Re Boston, R. B. & Lynn R. Co. (Mass.)* 596.

9. It is neither proper nor necessary for the Transit Commission in passing upon a petition by a traction utility to sell certain bonds to raise funds for needed equipment to consider whether the right of recapture reserved to the city in the contract between these parties has or has not matured, it being sufficient for it to consider that in the event of such recapture, the proposed financing might involve the retirement of such bonds at a premium causing the payment of an amount in excess of the funds realized. *Re New York Rapid Transit Corp. (N. Y. T. C.)* 274.
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SECURITY ISSUES—continued.

10. The Commission has the authority to examine the merits of a proposed sale of bonds at 80 per cent of par value by a traction utility to its parent company in view of the fact that there can be no bargain or negotiation between the two companies as to price, and that the parent company is both buyer and seller, fixing its own price and terms and admittedly making no effort to sell elsewhere or get a bid and that it may by corporate procedure turn such bonds into the sinking fund at 97 per cent as against the interest of the city who is a co-partner of the utility having an interest in the property many times greater than the latter and in many other ways vitally concerned by the proposed financing. *Re New York Rapid Transit Corp. (N. Y. T. C.)* 274.

11. The Commission has the right (Chap. V—Art. XXII—City Contract No. 4) to require that bonds sold by a traction utility to its parent company be disposed of by competitive bidding to protect the city against improvidence of corporate manipulation. *Re New York Rapid Transit Corp. (N. Y. T. C.)* 274.

12. It is the duty of the Commission to proceed with the functions assigned to that body by the General Assembly where the latter has determined the question of policy in regard to the purpose of security issues. *Re United Electric Power Co. (R. I.)* 641.

III. Purpose.

13. Proper and legitimate expenditures made necessary in accomplishing the results authorized by a charter, such as incorporation fees, stamps, legal, engineering, banking and brokerage services, advertisements and other expenses incidental to the sale of securities may all form a proper basis for the issue of capital securities. *Re United Electric Power Co. (R. I.)* 641.

14. Capitalization of such expenditures as appear to have been prudently made and reasonably necessary in the accomplishment of the purposes set forth in the charter of a company consolidating power utilities should be permitted, provided they do not exceed the fair value of property acquired. *Re United Electric Power Co. (R. I.)* 641.

IV. Sale price and interest rate.

15. Bonds to be issued at \$93 on \$100 to provide for the electrification of a steam railroad were approved where the difference between the sale price and the face value was amortized and could be absorbed by the savings effected by the change of operation. *Re Boston, R. B. & Lynn R. Co. (Mass.)* 596.

16. A proposal of a traction utility to sell "sinking fund" bonds at a discount of 20 per cent under a contract to its parent company was held to be unjust and burdensome to the city which would lose a great amount under this arrangement in event of an exercise of its right to recapture the property in which it had an investment largely in excess of the utility, especially where it was possible to sell "first refunding" bonds to raise the amounts needed at a net return of from 95 to 97 per cent of par value. *Re New York Rapid Transit Corp. (N. Y. T. C.)* 274.

17. A sale of 5 per cent bonds by a traction company with net earnings *P.U.R.*1928B.

SECURITY ISSUES—continued.

above fixed charges of almost \$6,000,000 paying annual dividends of \$4,500,000 was believed to be possible at a much higher rate than 20 per cent discount, a figure at which the bonds were sought to be acquired by the parent company. *Re New York Rapid Transit Corp. (N. Y. T. C.)* 274.

18. The sale of bonds alleged to have been authorized only for "emergencies" of a traction company at a small discount to realize sums needed for additional equipment instead of a proposed sale by contract of sinking-fund bonds of the same company to its parent concern at a 20 per cent discount was held not to be a breach of faith toward bondholders of the parent company purchasing with knowledge that the alleged "emergency" bonds were authorized as a part of a "plan for reorganization," especially where an amount in excess of \$33,000,000 of the total issue (\$50,000,000) would be left for "emergencies." *Re New York Rapid Transit Corp. (N. Y. T. C.)* 274.

SEPTIC TANK.

Summer resort company engaged in serving cottages with light and water as not to discontinue service because of failure of consumers to install septic tank, see **SERVICE**, 30.

SERVICE.*I. In general, 1.**II. Jurisdiction and powers of Commissions, 2-8.**III. Duty to serve, 9-16.**IV. Extensions, 17-19.**V. Abandonment and discontinuance, 20-33.**a. In general, 20-26.**b. Grounds for abandonment or discontinuance, 27-33.**VI. Accessories and connections, 34-37.**VII. Particular utilities, 38-52.**a. Automobile, 38, 39.**b. Railroad, 40.**c. Telephone, 41.**d. Water, 42-52.**I. In general.*

Factors affecting admission of competition, see **MONOPOLY AND COMPETITION**.
Proper party to be made defendant on complaint demanding sewage service, see **PARTIES**, 1, 2.

1. The personal merit of a complainant against utility service is immaterial if the practice which he brings before the Commission is one having public interest and is unjust, unsafe, improper, or inadequate and susceptible to lawful correction by Commission order. *New England Teleph. & Teleg. Co. v. Department of Public Utilities (Mass. Sup. Jud. Ct.)* 396.

II. Jurisdiction and powers of Commissions.

Question whether a Commission has been given power by legislature to grant utility the right to cease operations altogether as not decided in *P.U.R.*1928B.

SERVICE—*continued*.

- proceeding where the utility has voluntarily invoked jurisdiction of Commission by filing petition for abandonment, see COMMISSIONS, 5.
- Extent of Commission jurisdiction of managerial questions of service, see COMMISSIONS, 11.
- Validity of Commission orders regarding proper installation of wiring when telephone company is engaged in interstate commerce, see INTERSTATE COMMERCE, 5-7.

Annotation on jurisdiction, powers, and duties of Commissions over service, p. 685.

2. A petition for an adjudication of questions incident to train service signed by fifteen bona fide citizens residing in the locality affected is necessary to the jurisdiction of the Railroad Commission in such matters. *Kansas City S. R. Co. v. Railroad Commission* (Ark. Sup. Ct.) 452.

3. A petition regarding railroad service is not required to be signed by fifteen citizens residing in the territory affected in order to give the Commission jurisdiction where the petition is brought by the railroad itself. *Kansas City S. R. Co. v. Railroad Commission* (Ark. Sup. Ct.) 452.

4. The new Railroad Commission of Arkansas has, under a law (Acts 1921, p. 177) abolishing the Corporation Commission, inherited all the powers and jurisdiction over the creation and abandonment of station agencies given to that body by a law (Acts 1919, No. 571, p. 411) creating the Corporation Commission and transferring to it all powers of the old Railroad Commission thereby abolished, which powers were granted under an amendment (2) of the Constitution and acts (1907, p. 356 amended by p. 821) notwithstanding the fact that such agencies were created by Legislative Acts (No. 50, Acts 1905). *Kansas City S. R. Co. v. Railroad Commission* (Ark. Sup. Ct.) 452.

5. The Commission has the implied power by virtue of legislative grants of jurisdiction over the creation and abandonment of station agencies to formulate, in the absence of statutory regulation, rules of procedure for the hearing of applications on the part of the railroad company to be permitted to abandon an agency which must provide for adequate notice to all interested parties. *Kansas City S. R. Co. v. Railroad Commission* (Ark. Sup. Ct.) 452.

6. Jurisdiction to receive and hear but not necessarily to decide a complaint concerning the refusal of telephone service over equipment alleged to be properly installed by the complainant resides in the Commission, under a law (G. L. chap. 159, § 16) giving it power to consider complaints of service by common carriers then or subsequently placed under its regulation. *New England Teleph. & Telég. Co. v. Department of Public Utilities* (Mass. Sup. Jud. Ct.) 396.

7. Orders of the Commission imposing upon the telephone company the expense of investigating wires and wiring not selected and constructed under its direction are illegal. *New England Teleph. & Telég. Co. v. Department of Public Utilities* (Mass. Sup. Jud. Ct.) 396.

8. The right of the Commission to permit the withdrawal of a street railway company property from the use of the public should logically be accompanied by the authority to fix reasonable terms and to compel the P.U.R.1928B.

SERVICE—*continued.*

withdrawal of all of the property where the leaving of a portion thereof, such as tracks, ties, and roadbed, might constitute a public nuisance to the highway. *Re Helena Electric R. Co.* (Mont.) 601.

III. Duty to serve.

Requirement that purchasing utility bind itself to assume duties to public previously incumbent upon utilities merged, see CONSOLIDATION, MERGER, AND SALE, 8.

Materiality of question as to what applicant for water service did upon returning from trip to find water supply yet unfurnished, see EVIDENCE, 5.

Denial of receipt of letter from city plant officials as admissible in evidence in suit for damages for failure to serve, see EVIDENCE, 6.

Materiality of evidence as to duty to serve, see EVIDENCE, 10, 11.

Annotation on duty to serve, p. 685.

Annotation on pending sale as affecting duty to serve, p. 685.

9. A utility's choice of means wherewith to render service and agreements or contracts it may have made pursuant thereto such as service over municipally owned and constructed mains cannot be given the effect of lessening in any way its primary duty and liability to provide facilities and service generally and without discrimination throughout its territory. *Dunlap v. Clarendon Hills Water Co.* (Ill.) 582.

10. A municipal water utility is under a duty to consumers to supply the water impartially to all reasonably within the reach of its pipes and mains. *Merryman v. Baltimore City* (Md. Ct. App.) 546.

11. A summer resort company engaging in serving the public with water and light is rendering public service and has a duty to serve all patrons alike without discrimination even though it is only a semi-public utility corporation. *Ten Broek v. Miller* (Mich. Sup. Ct.) 369.

12. A utility voluntarily signing an agreement to furnish water to a municipality and entering the field assumes the burden placed upon it by law to give adequate service (§ 10477 Revised Statutes of Missouri 1919). *Lee's Summit v. Independence Waterworks Co.* (Mo.) 193.

13. Adequate service is as much a corollary to fair rates of return as is the right to demand a fair rate of return for service rendered. *Lee's Summit v. Independence Waterworks Co.* (Mo.) 193.

14. A company rule that no water service connections will be installed between December 1st and April 1st is unreasonable in view of the vital need for service extensions during all seasons. *Clearfield v. Clearfield Water Co.* (Pa.) 630.

15. By filing an opposing application for a certificate to operate motor busses over substantially the same territory served by its street cars an interurban railway company was held to admit the force of the position taken by another applicant for the same certificate that the street railway service was inadequate. *Re Jewett* (Vt.) 225.

16. A public utility cannot accept only such parts of a franchise as convey rights without assuming the obligations imposed by other parts of P.U.R.1928B.

SERVICE—continued.

the same instrument, such as the duty to serve. *Eagle River v. Railroad Commission* (Wis. Cir. Ct.) 561.

IV. Extensions.

Annotation on extensions of service, p. 688.

17. An agreement between residents of an elevated section outside of city limits, but within the metropolitan area, and a water utility by which the residents consented to higher rates for service than those collected from city patrons, in consideration of the additional equipment made necessary to maintain pressure at such altitude and the expense of service extension, was approved by the Commission as just and reasonable to the parties thereto as well as other consumers within the city limits. *Re Boise Water Co.* (Idaho) 578.

18. Service to an applicant therefor who resides on that side of a boundary street which is just outside of the corporate limits of a village in which a utility has previously confined its operation, should not be denied where neither the certificate of convenience nor the articles of incorporation restrict the utility from extending service to all within a reasonable radius of access to its mains within § 38 of the Commerce Commission Act. *Dunlap v. Clarendon Hills Water Co.* (Ill.) 582.

19. Water service from a main constructed by a village for use of a private utility operating wholly within the same was ordered on complaint of a consumer residing on that side of a boundary street which was just outside of the corporate limits but directly opposite such main, notwithstanding refusal of service by the village and by the utility, in view of the fact that the latter had undertaken the responsibility of service throughout the territory within a reasonable radius of access as provided by law (§ 38 of an Act Concerning Public Utilities, June 21, 1921), and further that it had a monopoly of service in that vicinity subject to the jurisdiction of the Commission. *Dunlap v. Clarendon Hills Water Co.* (Ill.) 582.

*V. Abandonment and discontinuance.**a. In general.*

Commission jurisdiction over abandonment, see *supra*, 2-5, 8.

Annotation on abandonment and discontinuance of service, p. 689.

20. A company which, by means of a foreclosure sale, becomes possessed of a public utility water system must continue to render service unless and until authorized to discontinue, since purported transfers of property devoted to public use are void when not authorized by the Commission. *Re Marin Lumber & Supply Co.* (Cal.) 661.

21. A judgment for damages resulting from the unlawful discontinuance by a utility of light and water measured by a failure of consumer to rent his cottages as a result of such discontinuance was held to be proper. *Ten Broek v. Miller* (Mich. Sup. Ct.) 369.

22. The Commission must decide a complaint by a municipality against a water utility for an insufficient supply from the evidence and the facts that are applicable, and it cannot be governed by the terms of a contract P.U.R.1928B.

SERVICE—continued.

between the parties. *Lee's Summit v. Independence Waterworks Co. (Mo.)* 193.

23. The Commission in granting the petition of a street railway company to cease its operations as a whole, ordered the service to be continued until a future date, in order to guard against any hiatus in the transportation service of a city and its contiguous territory. *Re Helena Electric R. Co. (Mont.)* 601.

24. The fact that a utility devotes its property to public use by operating a street railway system which it has purchased after the expiration of the franchise therefor does not constitute an irrevocable or absolute dedication of its property to the use of the public. *Re Helena Electric R. Co. (Mont.)* 601.

25. The Commission ordered a street railway utility in withdrawing its property from the use of the public to leave the streets, avenues, and highways in a good condition of repair. *Re Helena Electric R. Co. (Mont.)* 601.

26. The fact that an involuntary operator of a drainage utility, operating because of the failure of a proposed corporation promotion, has been functioning under severe losses, does not relieve him of the obligation to serve the public where he has not submitted himself to the jurisdiction of the Public Service Commission to procure rate adjustments to reduce deficits or to obtain other benefits of the Public Service Law. *Devon Park Hotel Corp. v. Hunter (Pa.)* 624.

b. Grounds for abandonment or discontinuance.

Discontinuance of service to enforce payment, see *PAYMENT*.

Annotation on inadequate return as affecting abandonment of service, p. 690.

Annotation on improper actions of patrons as affecting service discontinuance, p. 691.

27. A water utility operating at an increasing loss was permitted to discontinue service notwithstanding the fact that previous operation had been conducted without Commission authority, where the supply was shown to be unfit for human consumption and the subscribers had access to a purer supply. *Re Gore Brothers (Cal.)* 541.

28. A petition by an interurban railway to discontinue local service in a city on its system because of alleged failure of revenue should be denied if additional revenue can be obtained in the operation of such city service by efforts to run on regular schedule and with adequate facilities. *Re Chicago, S. B. & N. I. R. Co. (Ind.)* 505.

29. An electric railway is still under the obligation to furnish street railway service to the public in a city through which it operates interurban cars if this can be done without placing too great a burden upon its system as a whole, notwithstanding the franchise has been surrendered as provided by law. *Re Chicago, S. B. & N. I. R. Co. (Ind.)* 505.

30. A summer resort company engaged in serving its cottages with light and water may not discontinue service because of the failure of a consumer to install a septic tank when ordered to do so, whether or not the com-P.U.R.1928B.

SERVICE—continued.

pany had any rule or regulation to that effect. *Ten Broek v. Miller* (Mich. Sup. Ct.) 369.

31. The devotion by a street railway company of its property to a public use by the operation of a system after the expiration of the franchise therefor is predicated upon the assumption and condition that the public shall supply sufficient traffic to yield a fair return, and upon a clear showing that future operations must be at a loss it has the unquestionable right to discontinue operations and salvage what it can by dismantling the system. *Re Helena Electric R. Co.* (Mont.) 601.

32. The fact that the terms of an original franchise may continue to govern the use of streets by a railway company and its successor so long as they exercise the privileges contained therein does not give rise to any obligation on the part of the street railway company to operate a system at a loss where there is nothing in the franchise but a permissive charter. *Re Helena Electric R. Co.* (Mont.) 601.

33. A gas utility is justified in discontinuing service where the consumer refuses or neglects to maintain a condition at his residence admitting of regular meter readings, without hazard or threat of same to the reader from such causes as vicious dogs. *Wood v. Public Service Electric & Gas Co.* (N. J.) 609.

VI. Accessories and connections.

Order requiring telephone company to become owner of privately installed service equipment as unreasonable interference with property rights, see CONSTITUTIONAL LAW, 6.

Failure to read and remove meter on request, see PAYMENT, 2.

Suspension of rule requiring utilities to own and maintain meters and incidental connections with express restriction that such equipment is not to be used in determining rate base, see VALUATION, 41.

34. It was considered impracticable to enforce the provisions of a rule requiring water utilities to own and maintain all meters and incident connections in view of the burden of increased capitalization necessary to absorb the expense of acquiring such property, the fact that a meter is often special in its application, being valueless to the utility in case of service abandonment, and the fact that consumers take better care of their own property. *Re Rules Regulating Service* (Colo.) 681.

35. A utility rule providing that connections from the street mains to the curb line should be laid only after the applicant for service has completed his line to the curb is unreasonable where the company by control of its own activities in reasonably meeting the requirements for service is sufficiently protected. *Clearfield v. Clearfield Water Co.* (Pa.) 630.

36. A company rule placing upon the consumer the burden of expense in investigating service lines at his request where the defect is found not to exist in the utility's part of the line was held unreasonable in view of the duty of the company, in case of a reasonable doubt, to see that its own lines are functioning properly and in view also of the fact that a service charge is supposed to cover such expense. *Clearfield v. Clearfield Water Co.* (Pa.) 630.

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SERVICE—continued.

37. Utility rules providing that negligent damage to equipment during excavations should be paid for by the responsible party, that service should be discontinued where utility equipment has been tampered with and that no plumber or other unauthorized person should disconnect the supply at the utility's stop or molest its meters were all declared unreasonable in so far as they attempted to bind the consumer for liability for the possible acts of third parties. *Clearfield v. Clearfield Water Co.* (Pa.) 630.

*VII. Particular utilities.**a. Automobile.*

Annotation on automobile service, p. 691.

Discussion of the relative advantages and relative costs of transportation service by rail and automobiles, p. 445.

38. Whether the station at which passengers or freight are loaded and unloaded is inside or outside of the corporate limits of cities or towns along a bus route is immaterial since the provisions of an act (Acts of 1927, p. 257, § 1) providing for the authorization of motor vehicles "between cities or towns" operate to designate only the terminals of the line or route to be authorized. *State v. Haynes* (Ark. Sup. Ct.) 650.

39. A motor carrier has no right to refuse to transport passengers on the highway to and from intermediate points on their route, since passengers along the highways are entitled to carriage on the first available bus to their destination, provided such bus has unoccupied seats. *Re Standards for Motor Carriers* (Or.) 611.

b. Railroad.

Annotation on substitution of bus for rail service, p. 685.

Annotation on railroad station agents, p. 686.

Annotation on railroad service, p. 691.

Annotation on street railway service, p. 692.

Discussion of the ways in which electrification of steam lines reduces operating expenses and improves service, p. 598.

40. In the absence of a contract by which a railroad company is obligated to maintain a side track and trestle by an order of the Corporation Commission made under legislative authority (C. S. § 1044) the carrier cannot be made liable for the cost of making repairs, although necessary upon a side track and trestle to be used exclusively for the benefit of a private industry. *Mills v. Norfolk-Southern R. Co.* (N. C. Sup. Ct.) 373.

c. Telephone.

Annotation on telephone service, p. 693.

Annotation on directory listings by telephone companies, p. 693.

Annotation on telephone exchange areas, p. 694.

41. Arrangements should be made for intercepting service in connection with "temporarily disconnected" stations where the practice of giving a call for such station a "do not answer" report instead of "referred service" is misleading and results in repeated attempts to call the same number at the operating expense of the utility. *Re Pomona Valley Teleph. & Teleg. Union* (Cal.) 705.

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SERVICE—*continued*.**d. Water.**

Annotation on water service, p. 695.

42. The acceptance by a city water utility of an application for service in which the applicant agrees to pay for the connection and all charges incident to service creates an implied contract under which the city by implication agrees to supply the water within a reasonable time thereafter. *Merryman v. Baltimore City* (Md. Ct. App.) 546.

43. A city water utility is under an obligation to notify an applicant for service that a new main would have to be installed in order to afford him the opportunity of availing himself of the supply within a reasonable time even at increased cost. *Merryman v. Baltimore City* (Md. Ct. App.) 546.

44. A utility whose service contract has been waived at its request by the Commission for the purpose of increasing its rates to allow it a fair value cannot thereafter insist upon strict observance if the Commission in an effort to render justice to the consumers on a complaint is forced for the second time to disregard the express terms of the contract. *Lee's Summit v. Independence Waterworks Co.* (Mo.) 193.

45. A utility supplying water to a municipal reservoir, upon complaint of the municipality of insufficient supply, was ordered to take immediate action to relieve the complainant of further expense in the operation of a booster pump with which the latter had attempted to maintain a sufficient supply. *Lee Summit v. Independence Waterworks Co.* (Mo.) 193.

46. A charge payable in advance for turning on water after shutting off for nonpayment of a bill or any violation of the terms of applications or rules of a water company was substituted for a charge for turning on water after shutting off for nonpayment of bill or any violation of the terms of applications or rules of the company, the same charge being made applicable for turning on or off water at the request of an applicant because of repairs on his premises or on account of a reported vacation or disuse, the services mentioned in the latter part of this rule being covered by the service charge. *Clearfield v. Clearfield Water Co.* (Pa.) 630.

47. A company rule requiring certain territorial conditions likely to produce reasonable revenue as a condition precedent to the extension of mains and service has no place in rules and regulations providing a working basis for company-consumer relationship which does not exist until service has already been extended. *Clearfield v. Clearfield Water Co.* (Pa.) 630.

48. "Turn on and off" charge is a charge, not a service rate, and should appear in the rules and not in the rates. *Clearfield v. Clearfield Water Co.* (Pa.) 630.

49. A meter testing charge is not a rate for service and, therefore, should not appear under rates where provided for in the rules. *Clearfield v. Clearfield Water Co.* (Pa.) 630.

50. A consumer's deposit is not a rate for service and the amount, therefore, should be added to a rule covering the same and eliminated from the rate schedule. *Clearfield v. Clearfield Water Co.* (Pa.) 630.

51. Rules regarding damage to or tampering with service equipment as far as they deal with plumbers and parties other than the particular company. P.U.R.1928B.

SERVICE—continued.

sumer have no place in a rate tariff. *Clearfield v. Clearfield Water Co. (Pa.)* 630.

52. Company rules providing that all private fire service must be controlled by meter and imposing other restrictions for use of water passing through such meter for other than fire protection were declared indefinite and unreasonable and a detailed revision suggested by the Commission. *Clearfield v. Clearfield Water Co. (Pa.)* 630.

SERVICE CHARGE.

Reduction of service charge in view of dissatisfaction among consumers, see **RATES**, 21.

SERVICE CONNECTIONS.

Accessories and service connections, see **SERVICE**, 34-37.

SEWERS.

Dismissal of complaint demanding sewage service as to trust company which may have adverse interest, see **PARTIES**, 1.

Service requirements on condition that owners file bond to indemnify sewage company against loss from arrearages, see **PAYMENT**, 5.

Promoter who, by reason of the failure of a proposed corporation to take over a sewerage system, is in control of the system and actively solicits business as operator of a public utility, see **PUBLIC UTILITIES**, 8.

Individuals constructing sewage system for purpose of developing land and making a tappage charge as constituting themselves a public service company especially where mains are located under highways, see **PUBLIC UTILITIES**, 9.

SHERIFF'S SALE.

Seizure and sale of motor bus equipment by sheriff and resumption of service by the purchasers under authority of Commission as causing break in continuity of service originating prior to regulation, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 22.

SIDE TRACKS.

Suggestion in brief filed for industry appealing judgment dismissing suit against railroad for expense of side track maintenance that carrier is liable for repair expense under orders of Director General of Railroads as not properly before court, see **APPEAL AND REVIEW**, 5.

SMALL CONSUMERS.

Allocation of customer costs in determining gas rate structure, see **RATES**, 26, 27.

SOLICITATIONS.

Effect of solicitous advertising and correspondence on status of carrier as public or private, see **PUBLIC UTILITIES**, 7.

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See also **SECURITY ISSUES**.

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Evasion of laws regulating stock buying in competitors by holding companies, see **INTERCORPORATE RELATIONS**, 1, 2.

STOCKHOLDERS.

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STREET RAILWAYS.

Question whether a Commission has been given power by legislature to grant utility the right to cease operations altogether as not decided in proceeding where the utility has voluntarily invoked P.U.R.1928B.

STREET RAILWAYS—*continued.*

- jurisdiction of Commission by filing petition for abandonment, see COMMISSIONS, 5.
- Decision by Public Service Commission of sister state compelling street railway company upon discontinuance to leave surface of streets in condition similar to remainder of highway under statute in that state as not applying where there is no such statute, see COMMISSIONS, 6.
- Jurisdiction of Commission to relieve franchise obligations, see COMMISSIONS, 8.
- Consolidation of companies, see CONSOLIDATION, MERGER, AND SALE, 9.
- Metropolitan transit reorganization, see CONSOLIDATION, MERGER, AND SALE, 11-14.
- Compulsory operation of street railway system at a loss as unconstitutional, see CONSTITUTIONAL LAW, 7.
- Crossings generally, see CROSSINGS.
- Motor bus competition with street railways, see MONOPOLY AND COMPETITION.
- Street railway franchises as subject to legislative regulation as to rates, see RATES, 2.
- Waiver of franchise provision by municipality, see RATES, 9.
- Rates of fare as not to be established to produce theoretical returns when their practical application is likely to restrict traffic so as to defeat purpose, see RATES, 15.
- Street railway rates, see RATES, 32, 33.
- Profit on valuation not in excess of reproduction price as not unfair burden upon public, see RETURN, 5.
- Deduction to represent year's deficit of a bus line which a street railway company has agreed to reimburse, see RETURN, 26.
- Cost of street paving as an operating expense of a railway system, see RETURN, 30.
- Upset price of street railway property fixed by court in receiver's sale as of little importance in determining amount of securities to be issued by new company, see SECURITY ISSUES, 2.
- Provisions relating to mortgage bonds and other securities of company purchasing street railway at receiver's sale, see SECURITY ISSUES, 3.
- Jurisdiction of Commission to consider recapture provision of city traction contract, see SECURITY ISSUES, 9.
- Power of Commission to examine bond sale between affiliated companies with consideration of interest of city as copartner in property, see SECURITY ISSUES, 10.
- Commission power to require competitive bidding at sale of utility bonds, see SECURITY ISSUES, 11.
- Right of Commission to permit withdrawal of street railway company property from use of public as accompanied by authority to fix reasonable terms, see SERVICE, 8.
- Filing of opposing application for certificate to operate motor busses over substantially same territory as that served by street railway.

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- way as admission of force of position taken by another applicant that street railway service is inadequate, see **SERVICE**, 15.
- Authorization of street railway discontinuance to take place at future date in order to afford opportunity for establishment of substitute service, see **SERVICE**, 23.
- Sale price at receiver's sale as not necessarily indicative of value of property, see **VALUATION**, 12.
- Determination of value of assets of street railways for purpose of merging, see **VALUATION**, 13.
- Valuation of street railway easements, see **VALUATION**, 58-64.
- Discussion of the precarious financial condition of street railways since the advent of the automobile, p. 235.

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- See **INTERCORPORATE RELATIONS**.

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- Authorization of street railway discontinuance to take place at future date in order to afford opportunity for establishment of substitute service, see **SERVICE**, 23.

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- Subway crossings, see **CROSSINGS**.
- Securities of rapid transit corporation, see **SECURITY ISSUES**, 9-11, 16-18.

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- Summer resort company engaged in serving public as rendering public service and having duty to serve all patrons alike even though it is only a semi-public utility corporation, see **SERVICE**, 11.

SWITCHING.

- Railroad switching rates on sand, gravel and crushed stone, see **RATES**, 31.

TANGIBLE PROPERTY.

- Valuation of, see **VALUATION**, 41-57.

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- Taxes as an operating expense, see **RETURN**, 27, 28.
- Consideration of tax assessments in valuing traction easements, see **VALUATION**, 61.

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- Treatment of overheads in valuation, see **VALUATION**, 24-35.
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See also AUTOMOBILES.

Necessity of certificate for operation, see CERTIFICATES OF CONVENIENCE AND NECESSITY, 4, 6.

TAXPAYERS.

Unreasonably low rate of city plant causing burden on taxpayers, see RATES, 28.

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Consideration of notice to telephone company on review of order granting certificate to rival company, see APPEAL AND REVIEW, 4.

Apportionment of terminal fees between telephone companies, see AP-PORTIONMENT, 1.

Substitution of judgment of others for that of telephone company in determination of whether certain wires are suitable and are properly installed as interference with right of management going beyond reasonable limit of public control, see COMMISSIONS, 12.

Lack of Commission jurisdiction over questions of employees' wages, see COMMISSIONS, 13.

Consolidation of companies, see CONSOLIDATION, MERGER, AND SALE.

Order requiring telephone company to become owner of privately installed service equipment as unreasonable interference with property rights, see CONSTITUTIONAL LAW, 6.

Depreciation of telephone property, see DEPRECIATION, 16, 17.

Evasion of laws regulating stock buying in competitors by holding companies, see INTERCORPORATE RELATIONS, 1, 2.

Violation of law with regard to directors of domestic telephone company, see INTERCORPORATE RELATIONS, 2.

Validity of Commission orders regarding proper installation of wiring when telephone company is engaged in interstate commerce, see INTERSTATE COMMERCE, 5-7.

Authorization of increase in telephone rates where reconstruction of system from grounded to metallic lines is necessary and consented to by subscribers, see RATES, 14.

Telephone rates, see RATES, 34-37.

Economy of operation where coupled with efficiency of operation as not to be penalized but to be recognized in giving consideration to proper annual dividends, see RETURN, 6.

Return allowed for a telephone company, see RETURN, 12, 13, 15.

Increased operating expenses following consolidation, see RETURN, 19.

Commission jurisdiction over equipment to be installed for telephone service, see SERVICE, 6, 7.

Commission jurisdiction to hear complaints against telephone service, see SERVICE, 6.

Telephone service, see SERVICE, 41.

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Consideration of obsolescent property in valuation, see **VALUATION**, 14, 15.

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Wrongful admission of oral testimony as to construction policy of highway department with reference to grades as not prejudicial error, see **EVIDENCE**, 1.

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Test period for rates, see **RATES**, 38.

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Rules and regulations of water utility, see **SERVICE**, 46-52.

Actual cost of additions to plant during recent months as test applicable to reproduction cost figures, see **VALUATION**, 8.

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Right of Commission to permit withdrawal of street railway company property from use of public as accompanied by authority to fix reasonable terms, see **SERVICE**, 8.

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Rates for long distance telephone service, see **RATES**, 34-36.

TOOLS.

Deductions from estimates in valuing second-hand tools and equipment, see **VALUATION**, 43.

TOWBOATS.

See **BOATS**.
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TRACKS.

Right of Commission to permit withdrawal of street railway company property from use of public as accompanied by authority to fix reasonable terms, see **SERVICE**, 8.

TRAFFIC.

Rates of fare as not to be established to produce theoretical returns when their practical application is likely to restrict traffic so as to defeat purpose, see **RATES**, 15.

TRAINS.

Requisites of petitions to give Commission jurisdiction over complaint against railroad service, see **SERVICE**, 2, 3.

TRANSFER.

Approval of merger of two street railway companies where uniting of systems with resulting transfer privileges will be for great convenience of large number of people, see **CONSOLIDATION**, **MERGER**, AND **SALE**, 9.

TRANSIT REORGANIZATION.

Metropolitan transit reorganization, see **CONSOLIDATION**, **MERGER**, AND **SALE**, 11-14.

TRANSMISSION LINES.

Percentage allowance for depreciation of items of natural gas property, see **DEPRECIATION**, 11-15.

TRANSMISSION MAINS.

Apportionment applied to transmission system of natural gas company having property in two states as applied to line loss, see **APPORTIONMENT**, 2.

TRENCHING.

Treatment of cost of trenching and backfilling in natural gas property valuation, see **VALUATION**, 46.

UNCOLLECTIBLE ACCOUNTS.

Reserve for uncollectible accounts of natural gas company as not chargeable to operating expense when each consumer is required to make deposit, see **RETURN**, 31.

UNUSED PROPERTY.

Treatment of, in valuation, see **VALUATION**, 47-51.

UPSET PRICE.

Upset price of street railway property fixed by court in receiver's sale as of little importance in determining amount of securities to be issued by new company, see **SECURITY ISSUES**, 2.

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- I. Ascertainment of value generally, 1-13.*
 - a. Measures of value for rate making, 1-4.*
 - b. Ascertainment of reproduction cost, 5-9.*
 - c. Ascertainment of value for purpose of security issues, 10.*
 - d. Ascertainment of value for consolidation or sale, 11-13.*
- II. Accrued depreciation, 14-21.*
- III. Nonphysical elements affecting value, 22-35.*
 - a. In general, 22.*
 - b. Bond discount, 23.*
 - c. Overheads, 24-35.*
- IV. Miscellaneous charges to capital, 36-40.*
- V. Tangible property, 41-57.*
 - a. In general, 41-46.*
 - b. Property not used or useful, 47-51.*
 - c. Working capital, 52-57.*
- VI. Intangible property, 58-79.*
 - a. Easements, 58-64.*
 - b. Going value, 65-74.*
 - c. Leases and leaseholds, 75-78.*
 - d. Rights of way, 79.*

Absence of necessity for determining rate base in proceeding for Commission approval of consolidation of electric utilities, see **CONSOLIDATION, MERGER, AND SALE**, 6.

Necessity of valuation to determine reasonableness of return, see **RETURN**, 9-11.

- I. Ascertainment of value generally.*

- a. Measures of value for rate making.*

Present fair value rather than money invested in utility property as basis on which to calculate rates, see **RETURN**, 3.

1. The Commission in valuing natural gas property which has recently been purchased is entitled to know the amount for which the property was sold. *Re Cumberland & A. Gas Co. (W. Va.)* 20.

2. An estimate of the reproduction cost of utility property determined by checking the books by the application of index figures has little, if any, evidentiary value in determining the rate base where the books are not properly kept, and only 75 per cent of the property is checked with the accuracy required for its use in applying index figures. *Re Cumberland & A. Gas Co. (W. Va.)* 20.

3. The use of estimates of the cost of reproducing utility property, less accrued depreciation, is not the sole method of proving present value, although such estimates are to be given major consideration. *Re Clarksburg Light & Heat Co. (W. Va.)* 290.

4. An order of the Commission in a rate proceeding using a rate base predicated upon book value must be modified to conform to the law laid down by the United States and state supreme courts requiring valuation of P.U.R.1928B.

VALUATION—continued.

utility property for a rate proceeding to be substantially based upon present-day prices. *Re Wisconsin Teleph. Co. (Wis.)* 434.

b. Ascertainment of reproduction cost.

5. Any savings which would result from the use of less expensive construction under present day conditions should be reflected in the finding of fair value rather than in the reproduction cost estimates, which should include the cost of reproduction of a structure as it exists. *Knoxville v. South Pittsburgh Water Co. (Pa.)* 204.

6. The proper application of the cost of reproduction theory to land is a determination by appraisal of the value of each parcel of land in accordance with the market value of other land similarly situated in the same locality and enjoying similar improvements without regard to the purposes for which it was used, with the addition of a broker's commission and an adequate amount for other transfer costs. *Re United Electric Power Co. (R. I.)* 641.

7. The accepted rules of evidence cannot be entirely disregarded by presenting an estimate of reproduction cost based on expert opinion testimony unsupported by available testimony of persons personally acquainted with the property inventoried; but the correctness of the inventory may be assumed for the purpose of analyzing the property included in the reproduction cost exhibit and determining the reproduction cost thereof. *Re Cumberland & A. Gas Co. (W. Va.)* 20.

8. The actual cost of additions to a plant during recent months may be applied as to test to reproduction cost figures. *Re Clarksburg Light & Heat Co. (W. Va.)* 290.

9. An engineer's estimate of probable costs should not outweigh the costs set up on the books of a public utility which are required to be kept in accordance with a uniform classification, in determining reproduction cost, although this test of reproduction cost estimates is not to be confused with "book costs" and "investment" at some date remote from the date of inquiry. *Re Clarksburg Light & Heat Co. (W. Va.)* 290.

c. Ascertainment of value for purpose of security issues.

Capitalization as bearing relation to earnings as well as cost or value of property, see **SECURITY ISSUES**, 1.

Treatment of application of power utility to issue additional securities because of alleged increase to value of land and water rights, see **SECURITY ISSUES**, 6.

10. The cost of reproduction new less depreciation was considered only for the purpose of determining whether the amount of capitalization for which authorization was sought bore a relation to or was in excess of its fair value. *Re United Electric Power Co. (R. I.)* 641.

d. Ascertainment of value for consolidation or sale.

11. The value of public utility property to be merged was determined by computing a practical estimate of all of the property based upon figures and evidence presented at the hearing and upon the official records on file **P.U.R.1928B.**

VALUATION—*continued.*

in the office of the Commission, such appraisals being brought up to date by applying to the appraisal and to the actual cost of additions to the physical property, factors to express the value of the property in the terms of current price levels for construction, labor, and material, adding thereto the actual capital expenditures during the current year but making no allowance for organization, going value, or other nonphysical items. Re Connecticut Light & P. Co. (Conn.) 263.

12. The sale price at a receiver's sale is not necessarily indicative of the value of property for street railway purposes where practically the only bidders were bondholders who had assented to a reorganization plan, who, accordingly, did not care to increase the amount available for distribution to nonassenting bondholders, and members of a reorganization committee who would not bid higher for the same reason. Re Boston, W. & N. Y. Street R. Co. (Mass.) 516.

13. For the purpose of merging two street railway systems the Commission determined that the value of the assets to be acquired should be on the basis of the balance sheets of the respective companies as of September 30, 1927, subject to the liabilities and credit accounts shown therein, pursuant to a provision of the Wisconsin Statutes (§ 196.535). Re Milwaukee Electric R. & Light Co. (Wis.) 345.

II. Accrued depreciation.

Determination of accrued depreciation, see DEPRECIATION, 8-10.

14. Obsolescent property in a situation where a telephone utility is faced with the necessity of an immediate reconstruction program should be given outstanding consideration in the valuation of such property for rate-making purposes. Re Cozad Mut. Teleph. Co. (Neb.) 695.

15. Increased rates were allowed on a temporary valuation based on a tentative estimate of investment less depreciation, with a reduction made necessary by reason of obsolescence in the utility property by reason of a probable necessity for reconstruction of the system from magneto to common battery. Re Cozad Mut. Teleph. Co. (Neb.) 695.

16. Reductions should always be made for property depreciation in finding value for rate determinations. Erie v. Mutual Teleph. Co. (Pa.) 536.

17. Depreciation in natural gas property resulting from the decreased life of the plant by reason of the exhaustion of the natural gas itself was considered in a valuation for rate making. Re Cumberland & A. Gas Co. (W. Va.) 20.

18. Transmission rights-of-way and land of a natural gas utility were not depreciated in a valuation proceeding. Re Cumberland & A. Gas Co. (W. Va.) 20.

19. No deduction was made for depreciation of office equipment of a natural gas company where the appreciation in the old furniture would equal its physical depreciation. Re Cumberland & A. Gas Co. (W. Va.) 20.

20. A deduction should be made in the valuation of natural gas property for redundancy or excess capacity which is shown to exist by reason P.U.R.1928B.

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of a large reduction in the quantity of gas transported through mains and pipes. *Re Cumberland & A. Gas Co. (W. Va.)* 20.

21. A Commission, in ascertaining valuation of utility property for purposes of rate making, must determine the extent of the depreciation in the property, when the depreciated reproduction value on a present price basis must be given material weight in fixing fair value. *Re Wisconsin Teleph. Co. (Wis.)* 434.

III. Nonphysical elements affecting value.**a. In general.**

22. An item claimed by a water utility in the cost of financing was materially reduced where the company was not in fact financed on the basis of the plan claimed and the experience of the Commission indicated that the cost would not accrue to that extent. *Knoxville v. South Pittsburgh Water Co. (Pa.)* 204.

b. Bond discount.

23. The entire amount of bond discount and brokerage should not be permitted to the capitalized on the books, but the proportion of such discount and brokerage which the construction period bears to the life of the bonds should be capitalized in the same way as interest during construction, and the balance should be amortized out of income during the life of the bonds. *Knoxville v. South Pittsburgh Water Co. (Pa.)* 204.

c. Overheads.

Application of reproduction cost theory to land appraisal by comparative appraisals with addition of broker's commission and adequate amount for other transfer costs, see *supra*, 6.

Disallowance of items for organization, see *supra*, 11.

Discussion of engineering, field supervision, contractors' profits, and overheads of a natural gas company, p. 117.

24. An allowance of 3.5 per cent was made for engineering and construction and 1.25 per cent on land. *Shamokin v. Roaring Creek Water Co. (Pa.)* 385.

25. An allowance of 5 per cent was made for engineering in the valuation of natural gas property. *Re Cumberland & A. Gas Co. (W. Va.)* 20.

26. An allowance of 6 per cent was made for interest during construction in the valuation of natural gas property. *Re Cumberland & A. Gas Co. (W. Va.)* 20.

27. An allowance of 2 per cent was made for corporate costs in the valuation of natural gas property. *Re Cumberland & A. Gas Co. (W. Va.)* 20.

28. An allowance of 1 per cent was made for legal expense in the valuation of natural gas property. *Re Cumberland & A. Gas Co. (W. Va.)* 20.

29. No overheads costs were added to general equipment of a natural gas company for the reason that the expense incurred for interest during construction, engineering, and legal expense would be negligible, and in view of the further fact that 14 per cent for overheads had been applied to land and other items. *Re Cumberland & A. Gas Co. (W. Va.)* 20.

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VALUATION—*continued.*

30. The foreman cost per foot for the construction of 10-inch pipe should be less than for the construction of 12-inch pipe. Re Cumberland & A. Gas Co. (W. Va.) 20.

31. Cost of the nucleus of an administrative system of general offices of a natural gas company, legal and legitimate commercial costs, and taxes and insurance during construction may be estimated at 3 per cent in determining reproduction cost. Re Clarksburg Light & Heat Co. (W. Va.) 290.

32. A total overhead cost of $7\frac{1}{2}$ per cent may be estimated on the physical plant of a natural gas company, in addition to direct overheads included in an appraisal, except on rights of way. Re Clarksburg Light & Heat Co. (W. Va.) 290.

33. An allowance of 5 per cent was estimated for engineering and engineering supervision on field, transmission, and distribution lines of a natural gas company. Re Clarksburg Light & Heat Co. (W. Va.) 290.

34. Reasonable sums should be estimated for additional expenses for purchasing materials, warehousing, omissions and contingencies, loss and waste of fittings, supervision, field accounting, use and loss of tools, and insurance in the theoretical rebuilding of a natural gas plant to determine reproduction cost. Re Clarksburg Light & Heat Co. (W. Va.) 290.

35. Interest at 6 per cent per annum for half the period of theoretical construction is a legitimate item of overhead costs in ascertaining reproduction cost of natural gas property. Re Clarksburg Light & Heat Co. (W. Va.) 290.

IV. Miscellaneous charges to capital.

Expenditures for labor and other expenses in drilling new gas wells as chargeable to gas well construction instead of to operating expenses, see RETURN, 34.

36. The cost of installing natural gas meters was fixed at $37\frac{1}{2}$ cents in determining reproduction cost where there was one estimate at 25 cents and another estimate of 50 cents. Re Cumberland & A. Gas Co. (W. Va.) 20.

37. Amounts which would properly be deducted from the book investment of a natural gas company for retirement were not deducted where the investment in the property should be amortized. Re Cumberland & A. Gas Co. (W. Va.) 20.

38. Charges for the cost of labor, hauling freight, and similar items incurred in the drilling of natural gas wells should not be included in the rate base of a natural gas utility when these items have been charged to operating expense. Re Clarksburg Light & Heat Co. (W. Va.) 290.

39. A charge under the title "Purchase Brown Bus Line Rights" was not considered an item properly to be included in fixing of value as a rate base where little or no equipment was purchased in this transaction, which amounted practically to a consideration being paid for a promise to discontinue competitive operation. Re Duluth Street R. Co. (Wis.) 228.

40. A proposed capital investment made necessary by a former Commission order directing the construction of a viaduct over a crossing and P.U.R.1928B.

VALUATION—*continued.*

apportioning part of the expense to a street railway, being a future matter concerning which there was considerable question as to the time when the construction would actually be made, was not considered a capital charge for the purposes of obtaining a rate base. *Re Duluth Street R. Co. (Wis.)* 228.

V. Tangible property.**a. In general.**

Application of cost of reproduction theory to land, see *supra*, 6.

Transmission rights-of-way and land of natural gas utility as not depreciated, see *supra*, 18.

41. A rule requiring utilities to own and maintain meters and incident connections was permanently suspended with the express restriction that such equipment owned by consumers should not be valued as useful utility property in any valuation for rate-making purposes. *Re Rules Regulating Service (Colo.)* 681.

42. An estimated allowance for a private road of a water utility was reduced where the Commission was not convinced that a roadway of so excellent a type of construction was necessary for the purposes of the utility. *Shamokin v. Roaring Creek Water Co. (Pa.)* 385.

43. Deductions were made from estimates of the value of tools and equipment of a water utility for certain equipment items which might be classified as second hand and which were also used by another company. *Shamokin v. Roaring Creek Water Co. (Pa.)* 385.

44. Valuation of expansion construction necessitated by service beyond the limits of a utility charter will be allowed in the rate base provided the return from the same is also included and regular consumers are not prejudiced by the extra-charter service. *Pottsville v. Pottsville Water Co. (Pa.)* 613.

45. The actual cost of pipe of a natural gas company, in the regular course of business and at the date of the appraisal, is to be preferred as a basis on which to arrive at value over theoretical prices based on general quotations of manufacturers or dealers, where a public utility company through its affiliations is enabled to secure its material advantageously. *Re Clarksburg Light & Heat Co. (W. Va.)* 290.

46. The actual dimensions of a trench are to be preferred to estimates in calculating the cost of trenching and backfilling for the purpose of laying natural gas pipes. *Re Clarksburg Light & Heat Co. (W. Va.)* 290.

b. Property not used or useful.

47. Parallel water mains, although originally constructed by competing utilities, were found sufficiently used by a utility possessing both systems as to be included in the reproduction cost estimate. *Knoxville v. South Pittsburgh Water Co. (Pa.)* 204.

48. A river crib used by a water utility for the purpose of getting a
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VALUATION—*continued.*

clear supply of water from beneath the river bed, upon a showing that it had served its entire useful life, was included in the reproduction cost estimate at a value of \$5,000, over the objection of the utility that it was still theoretically useful at \$37,322, the valuation of the Commission being for a second-hand facility. *Knoxville v. South Pittsburgh Water Co. (Pa.)* 204.

49. The Commission excluded from the reproduction cost estimate of a water utility the value of an ash conveyor upon a showing that, owing to a change of plant routine, the appliance had been unused for six years. *Knoxville v. South Pittsburgh Water Co. (Pa.)* 204.

50. Items of property not used by a public utility company should be deducted in a valuation for rate making. *Shamokin v. Roaring Creek Water Co. (Pa.)* 385.

51. A parallel transmission line no longer useful for the purpose for which it was originally constructed should be deducted in the valuation of natural gas property, when the remaining transmission line has a capacity in excess of that required to transport the gas being sold by the company. *Re Cumberland & A. Gas Co. (W. Va.)* 20.

c. Working capital.

52. A sum of \$1,500 for working capital on a valuation less depreciation of \$200,231 was allowed a telephone utility although city and rural rentals were collected from one to three months in advance respectively, because of the possibility of an emergency arising to make more cash necessary. *Re Clinton County Teleph. Co. (Mo.)* 796.

53. A water utility's calculation of working capital based on average cash on hand and accrued charges and credits for a period of one year and complaining ratepayer's calculation of one month's operating cost were both disapproved in the case of a water company collecting service charges in advance and metered charges quarterly. *Knoxville v. South Pittsburgh Water Co. (Pa.)* 204.

54. An amount of \$40,000 was allowed as working capital to a water utility having a three-month operating expense of \$110,000 but receiving \$70,000 from service charges paid in advance, in view of \$24,766 worth of supplies on hand, meter charges being collected quarterly. *Knoxville v. South Pittsburgh Water Co. (Pa.)* 204.

55. An allowance for working capital should be added in valuing natural gas property for rate making. *Re Cumberland & A. Gas Co. (W. Va.)* 20.

56. An allowance was made for working capital of a natural gas company based upon the average monthly operating expenses, together with an allowance for necessary supplies and working balance, where the utility collected its bills daily on monthly billings of gas consumed, in a sense doing a cash business. *Re Clarksburg Light & Heat Co. (W. Va.)* 290.

57. A charge may properly be made to fixed capital accounts on account of the company's funds being tied up in construction materials, but it would be an improper duplication of charges to patrons to include materials and supplies, as such, in the rate base. *Re Duluth Street R. Co. (Wis.)* 228.

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VALUATION—*continued.**VI. Intangible property.**a. Easements.*

53. A method of valuing traction franchises previously used by the Commission in a rate proceeding by which it took the tax assessment figures on those parts of the company's rights of way which were private and in which the public had no interest as a basis for arriving at the value of all easements was admitted to be erroneous by the same body where all easements were thus inadvertently treated as if they were exclusive rights of way acquired for value from private owners. *Re United R. & Electric Co. (Md.) 737.*

59. A street railway's "right to use" its easement strips, although having a value in addition to the actual use, is not so great as that of a private abutting property owner in view of the fact that the latter may use his premises for a vast number of lawful purposes whereas the company is restricted to the sole use of traction operation. *Re United R. & Electric Co. (Md.) 737.*

60. A tentative valuation by a street car company of part of its easement based on abutting property values containing admitted duplication of values at intersections of the easement strips and an addition of 55 per cent to bring 1914 valuation up to 1924, was accepted solely because no other estimate of equal or greater authority was placed before the Commission. *Re United R. & Electric Co. (Md.) 737.*

61. An additional increase of 20 per cent on a valuation of street railway easements as of 1924 which had been brought up to date by adding 55 per cent to the tax assessment figures of 1914 was not permitted in view of the policy of the tax authorities of that city in assessing property at 100 per cent value and where there was a wide enough factor of tolerance in duplications of value due to track intersections to make up for any decrease from actual value in the tax figures. *Re United R. & Electric Co. (Md.) 737.*

62. A separate allowance for the value of street railway pole and wire easements was not permitted where the equipment itself had already been considered in reproducible property figures and where a 10-foot easement strip per single track was thought to be a sufficient allowance for the poles and wires as well as the track itself. *Re United R. & Electric Co. (Md.) 737.*

63. Deducting highway crossings from private rights of way makes too small a difference in the total value of street railway easements to have a real effect in the valuation and such allowance, if necessary, can be made in another way without going into intricate calculations. *Re United R. & Electric Co. (Md.) 737.*

64. An apportionment of the relative interest of a street railway company and the public with relation to the total value of its easement strips was made on a basis of 25 per cent of the fee simple value of the strip to the company and 75 per cent to the public. *Re United R. & Electric Co. (Md.) 737.*

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VALUATION—*continued.***b. Going value.**

Disallowance for going value, see *supra*, 11.

Statement that the cost of establishing the business is not the going value of a natural gas plant, p. 95.

Discussion of the value of gas holdings of a natural gas company with a consideration of volume of gas in the ground, value of gas at the surface and cost of bringing the gas to the surface, p. 95.

63. An allowance should be made for going value, or in other words for the fact that a property with its business attached and in successful operation has a greater value than the same property ready to operate but not operating and without any attached business. *Re Clinton County Teleph. Co. (Mo.) 796.*

66. The proper allowance for going value is not to be determined by rule but is in the final analysis a matter of judgment. *Re Clinton County Teleph. Co. (Mo.) 796.*

67. The developmental cost of the business is not equivalent to or synonymous with the going value of a public utility, the determination of which depends upon many circumstances. *Knoxville v. South Pittsburgh Water Co. (Pa.) 264.*

68. Development cost of public utility business is not equivalent to or synonymous with going concern value but the determination of such value depends upon the consideration of the company's history, method of operation, character of plant and of service rendered, together with development cost and other pertinent facts. *Shamokin v. Roaring Creek Water Co. (Pa.) 385.*

69. Going concern value should not be on a percentage basis but should be determined only by the consideration of operating conditions in a particular case. *Erie v. Mutual Teleph. Co. (Pa.) 536.*

70. Going cost or development cost is but one of the elements which enter into the determination of going concern value. *Clearfield v. Clearfield Water Co. (Pa.) 630.*

71. A specific allowance was made for going value based on a consideration of the company's history, character of its plant and service rendered, development cost, and other pertinent facts. *Clearfield v. Clearfield Water Co. (Pa.) 630.*

72. An allowance for going value should be added in valuing natural gas property for rate making. *Re Cumberland & A. Gas Co. (W. Va.) 20.*

73. The Commission does not look with favor upon the practice of estimating going value on a flat percentage basis without convincing proof of the presence of a value in excess of the fair value of the utility's property, and exclusive of good will, franchise rights, and similar elements of value that are excluded from the rate base of public service corporations because of their monopolistic position in the community. *Re Clarksburg Light & Heat Co. (W. Va.) 290.*

74. An allowance may be made for going concern value from all the evidence before the Commission, if it is possible to do so, although no sum P.U.R.1928B.

VALUATION—continued.

has been proved to be assigned for that value. *Re Clarksburg Light & Heat Co. (W. Va.)* 290.

c. Leases and leaseholds.

75. The total amount invested by a natural gas company in leaseholds during the entire life of the property was allowed as the value of such leaseholds for rate making, where large amounts for rents and royalties had been charged to operating expenses, as well as the cost of drilling dry holes, especially where it appeared that part of the leases had been surrendered. *Re Cumberland & A. Gas Co. (W. Va.)* 20.

76. Boyle's Law cannot reasonably be applied to determine the volume or recoverable gas in property leased by a natural gas company when the gas producing sands in which the company's wells are drilled are honey-combed with producing wells owned by other companies and independent operators and the wells differ in size. *Re Cumberland & A. Gas Co. (W. Va.)* 20.

77. An estimate of the value of natural gas leaseholds based upon estimates of the market value of gas leases and upon the difference between the market value of the estimated gas in the ground and the cost of producing it, was rejected on the ground that market value is not a proper measure of the value of utility property other than land and buildings. *Re Clarksburg Light & Heat Co. (W. Va.)* 290.

78. Leaseholds and natural gas rights of a natural gas utility were valued at book cost, in the absence of competent proof of appreciation of the original cost, and in view of the further fact that the public had paid large amounts in rates on account of rentals and royalties for gas rights. *Re Clarksburg Light & Heat Co. (W. Va.)* 290.

d. Rights of way.

Transmission rights-of-way and land of natural gas utility as not depreciated, see *supra*, 18.

79. Opinion evidence of one who is familiar with the territory as to the value of rights of way should outweigh that of an appraiser who is not familiar with the territory and testifies from information. *Re Cumberland & A. Gas Co. (W. Va.)* 20.

VESSELS.

Wharf or landing place which appears to be out-of-line in normal navigation course between two major points as not given status of intermediate point under law providing for special rates to such points, see *RATES*, 24.

VIADUCTS.

Viaducts at railroad crossings, see *CROSSINGS*.

Proposed capital investment made necessary by order directing construction of viaduct over crossing and apportioning part of expense to street railway as not a capital charge at the present time, see *VALUATION*, 40.

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VISIBLE DETERIORATION.

Visible deterioration as not equivalent to accrued depreciation, see DEPRECIATION, 8.

WAGES.

See SALARIES AND WAGES.

WAIVER.

Utility as not entitled to insist upon compliance of contract which has been waived, see SERVICE, 44.

WATER.

Depreciation of water property, see DEPRECIATION, 18, 19.

Evidence in suit for damages for failure of municipal plant to furnish water, see EVIDENCE, 5-8.

Discount for prompt payment, see PAYMENT, 6.

Water system which has operated without filing rates with Commission until recent years as impressed with public utility obligations which cannot be discontinued without Commission consent, see PUBLIC UTILITIES, 1.

Commission jurisdiction over operation of municipally owned mains, see PUBLIC UTILITIES, 2.

Water system originally installed for purpose of supplying water to sawmill as a public utility where water has been sold to all applicants, see PUBLIC UTILITIES, 3.

Refusal of water system to accept payment after taking such compensation for many years as not changing its status to that of a private company, see PUBLIC UTILITIES, 4.

Reduction of service charge in view of dissatisfaction among consumers, see RATES, 21.

Failure to provide metered service to domestic consumers as not unreasonable where tariff discloses no discrimination and saving of water from such charge would not offset additional investment and expense, see RATES, 22.

Charge for reinstalling water meters in absence of explanation as not permitted, see RATES, 23.

Dismissal of complaint against rate structure as a whole where net income produced by tariff under attack will not be in excess of that produced by any reasonable rate of return which the Commission might justly find, see RETURN, 7.

Return allowed for a water utility, see RETURN, 14, 16.

Increase in administration charge by parent company as an operating expense of a water utility, see RETURN, 25.

Effect of collateral contracts on duty to serve, see SERVICE, 9.

Duty of municipal water utility to supply water impartially, see SERVICE, 10.

Summer resort company engaged in serving public as rendering public service and having duty to serve all patrons alike even though it is only a semipublic utility corporation, see SERVICE, 11.

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WATER—continued.

- Utility voluntarily signing agreement to furnish water to municipality and entering field as assuming burden placed upon it by law to give adequate service, see **SERVICE**, 12.
- Seasonal restrictions for extension of water service, see **SERVICE**, 14.
- Agreement between residents of elevated section outside of city limits, but within metropolitan area, and water utility consenting to higher rates for service in consideration of additional equipment, see **SERVICE**, 17.
- Company which by means of foreclosure sale becomes possessed of public utility water system as required to render service unless and until authorized to discontinue, see **SERVICE**, 20.
- Evidence and facts applicable, and not terms of contract as governing Commission decision as to complaint against insufficient water supply, see **SERVICE**, 22.
- Summer resort company engaged in serving cottages with light and water as not to discontinue service because of failure of consumers to install septic tank, see **SERVICE**, 30.
- Rules relating to water service connections with mains, see **SERVICE**, 35-37.
- Water service, see **SERVICE**, 42-52.
- Reduction in estimated allowance for private road of water utility, see **VALUATION**, 42.

WATER POWERS.

Requirement that corporations apply for certificates relating to development of hydroelectric energy, see **CERTIFICATES OF CONVENIENCE AND NECESSITY**, 1.

1. The bestowing of legal rights and privileges and franchises authorizing the operation by public service corporations of natural water powers situate within the state, by means of certificates of public convenience and necessity, which may not be obtained elsewhere or otherwise, is the only manner in which the Commission, in the exercise of its full powers to safeguard the rights of the state and fully protect its people, may impose the restrictions and limitations contemplated by the State Constitution and the pursuant statute. *Re Electric and Water Corporations (Ariz.)* 774.

2. The full and absolute power and control over the establishment, development, and operation of all the water power and hydroelectrical power in the state devolves upon the state subject only to the limited sovereign powers conferred upon the Federal Government under the Federal Constitution. *Re Electric and Water Corporations (Ariz.)* 774.

3. The state possesses the primary right to fix and impose such terms and conditions upon corporations developing hydroelectric power as will encourage the same within the state and at the same time protect the rights of the people from exploitation. *Re Electric and Water Corporations (Ariz.)* 774.

4. Licenses for the diversion of state water power are not granted **P.U.R.1928B**.

WATER POWERS—continued.

wholly for the benefit of the licensees but pursuant to the policy of the state favoring the generation of low priced hydroelectric power to the public. *Re Lockport & N. Power & Water Supply Co. (N. Y.)* 183.

WATER RIGHTS.

Treatment of application of power utility to issue additional securities because of alleged increase to value of land and water rights, see **SECURITY ISSUES**, 6.

WATERS AND WATER COURSES.

Annotation on waters and water courses, p. 778.

WEIGHT.

Schedule of step-up rates prescribed in order to conserve natural gas supply as not satisfactory where it is not possible for company to conserve gas underlying property, see **RATES**, 29.

WELLS.

Necessity of operating charges sufficient to care for depreciation and provide for retirement of additions to capital including gas well construction, see **DEPRECIATION**, 5.

Determination of accrued depreciation of natural gas well equipment, see **DEPRECIATION**, 10.

Percentage allowance for depreciation of items of natural gas property, see **DEPRECIATION**, 11-15.

Expenditures for labor and other expenses in drilling new gas wells as chargeable to gas well construction instead of to operating expenses, see **RETURN**, 34.

Depreciation in natural gas property resulting from exhaustion of natural gas, see **VALUATION**, 17.

Charges for cost of labor, hauling freight, and similar items incurred in drilling of natural gas wells as not included in rate base when these items have been charged to operating expense, see **VALUATION**, 38.

WHARVES.

Wharf or landing place which appears to be out-of-line in normal navigation course between two major points as not given status of intermediate point under law providing for special rates to such points, see **RATES**, 24.

WIRES AND CABLES.

Substitution of judgment of others for that of telephone company in determination of whether certain wires are suitable and are properly installed as interference with right of management going beyond reasonable limit of public control, see **COMMISSIONS**, 12.

Power interference with telegraph transmission, see **ELECTRICITY**, 1-3.
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WIRES AND CABLES—continued.

- Validity of Commission orders regarding proper installation of wiring when telephone company is engaged in interstate commerce, see INTERSTATE COMMERCE, 5-7.
- Commission jurisdiction over equipment to be installed for telephone service, see SERVICE, 6, 7.
- Valuation of trolley pole and wire easements, see VALUATION, 62.

WITNESS.

- Commission as not limited in its prerogative to regulate rates by admission of any witness, see COMMISSIONS, 1.
- Questions concerning facts within the common knowledge of man as correctly denied on cross examination of expert witnesses, see EVIDENCE, 4.
- Accepted rules of evidence as not to be entirely disregarded by presenting reproduction cost estimate based on expert testimony unsupported by testimony of persons acquainted with property, see VALUATION, 7.

WORKING CAPITAL.

- Treatment of, in valuation, see VALUATION, 52-57.

ZONES.

- Burden on appellant to overcome presumption in favor of Commission order denying application for creation of special zone for city on account of location as applied to source of natural gas, see APPEAL AND REVIEW, 6.
 - Zones on street railway, see RATES, 32.
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